IN THE SUPREME COURT OF YUKON

Citation: *C.R.M.* v. *T.E.H.,* 2008 YKSC 58

Date: 20080822
S.C. No. 03-B0016
Registry: Whitehorse

Between:

C.R.M.

Plaintiff
(Respondent)

And

T.E.H.

Defendant
(Applicant)

Before: Mr. Justice D. M. Cooper

Appearances:

C.R.M. — Appearing for himself
T.E.H. — Appearing for herself

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Applicant mother, T.E.H., applies for an interim order to vary previous "non removal" orders of this Court to allow her to relocate to Victoria with the child, L.J.B.H., he being the child of the relationship between the parties. The Respondent father, C.R.M., opposes the relocation application and, in the pre-hearing teleconference with Mr. Justice Vertes held July 29, 2008, indicated that he would be asking that this matter be set for trial on the return of this motion. At the hearing before me, the Respondent advised that he had changed his mind and indicated he would be prepared to have the matter decided

on the affidavit evidence before the Court. If I grant the Order to relocate, it will be necessary to vary terms of custody and access.

[2] The issue on this interim application is whether it is in the best interests of the child to grant the relief requested, to deny the relief or to set the matter down for trial.

FACTS

[3] The Applicant and Respondent commenced a common law relationship in October 1999. The child of the relationship, L.J.B.H., was born January 28, 2002. The parties separated during the month of February 2003. The Respondent shares custody of two children, Z. and M., now 16 and 14, from a previous relationship, and the evidence discloses that he encourages a close bond between L. and his half-brothers. Since the spring of 2003, the Applicant and Respondent have been before this Court on matters dealing with custody, access and child support on numerous occasions – eight times since November 2006, to the effect that this could be categorized as serial litigation; the very kind of activity which those involved in family law reform within our system of justice have sought to significantly reduce.

[4] It is useful to set out the substance of prior Orders of the Court relevant to these proceedings:

- June 5, 2003 – a non-removal order was made by Mr. Justice Vertes. The Applicant mother, was given interim custody and guardianship of L. with the Respondent, father to have specified access.
- November 6, 2006 – The previous order of the court was confirmed by Mr. Justice Groberman with neither party permitted to relocate outside this jurisdiction without the written consent of the other party or court order.

- December 14, 2006 – Martinson J. varied the previous Order of Vertes J. to give the parties joint custody and guardianship of L. with the primary residence being that of the mother with specified “residential time” to the father.
- October 18, 2007 – Mr. Justice Brooker once again restated the non-removal order, and specified an access schedule whereby the parties alternated having L. in their custody 3 days one week then 4 the next, and equally sharing custody. He also ordered that the parties were only to communicate in writing and not to visit the other party’s home or workplace without that party’s consent.
- November 21, 2007 – Mr. Justice Brooker ordered that the mother be restrained from attending any of the father’s hockey games until March 31, 2008.
- On August 4, 2008, the Applicant voluntarily entered into a Peace Bond after having been charged with, *inter alia*, Disturbing the Peace, in relation to an incident or incidents involving the Respondent.

[5] Between 2003 and 2006, the parties attempted unsuccessfully to reconcile but problems related to custody and access have since escalated, and it would appear from evidence on file and previous orders that the Applicant’s frustration has “boiled over” on a number of occasions and the court has been required to set conditions to minimize contact between the parties. I would pause to merely observe that shared parenting can be a very positive custodial regime for children and parents where the parties are able to cooperate and act responsibly in the best interests of the child. Conversely, where the actions of one or both parents make such an arrangement a continuing source of friction,

unhappiness, and basically unworkable, courts have not been unwilling to alter a shared custody regime and award sole custody to one parent. It is not in the best interests of a child to be witness to incidents of bitter outbursts or exchanges between parents, and such acrimony will have a negative ongoing effect on the emotional states of both parents and ultimately impact on the child.

[6] It is noted that, while the Applicant had interim custody of the child initially, the parties now have joint custody and an access regime that is shared equally. As well, it is clear that the issue of relocation has been in the minds of the parties from the outset. The Respondent maintains that the Applicant has repeatedly threatened to relocate, an assertion that is seemingly borne out by the fact that this court has issued “non-removal” orders in 2003, 2006 and 2007.

[7] The Applicant was employed as a Land Claims Heritage Implementation Coordinator with the Department of Tourism and Culture, Government of Yukon, until March 31, 2008, when her term position was eliminated due to lack of funding. Starting in March of this year the Applicant applied on four other advertised job opportunities with the Yukon Government, but to date has been unsuccessful in obtaining further employment. Sometime in the winter or spring of 2008 the Applicant applied to have L. admitted into an elementary school in Oak Bay, Victoria, and received confirmation of his acceptance on April 14th. Sometime after June 5, 2008, the Applicant applied for research officer positions with the Government of British Columbia, and her affidavit discloses that she was granted an interview. At the hearing, the Applicant advised the Court that she had now been interviewed and been asked by the employer to provide references.

[8] The Applicant says that a move to Victoria would offer economic stability for her and her children (the Applicant adopted an infant girl from China in August, 2007), and that she and L. would have closer ties and supports from family since she has a mother, a brother and a sister all resident in British Columbia. L. would also be able to maintain a relationship with the father's sister, A., who lives in the Vancouver lower mainland area. Further, the Applicant in her affidavit material and at the hearing stressed that a move to Victoria would allow L. to go to an excellent school and enjoy a wide variety of extra-curricular programs and activities which are not available in Whitehorse.

[9] Finally, in response to the Respondent's position that L's move would negatively affect his relationship with his half-brothers, the Applicant argues that it would preferable for L. to move at this stage in his life rather than in three or four years when his half-brothers, Z. and M., ages 16 and 14, will have "left the nest". The Applicant advised the Court she would be fully cooperative in facilitating up to 140 days of access to L. by the Respondent and Z. and M., but conceded the vast majority of that access would involve the Respondent travelling to Victoria and remaining there for extended periods of time.

[10] The Respondent's position is that the Applicant has for some years threatened to move to Victoria and that her motives in this application are to extricate herself from the difficult and tumultuous shared custody and access arrangements under which the parties are living, to virtually terminate L.'s relationship with his half-brothers, and to minimize the contact that the Respondent has with L. His evidence is that for a number of reasons the alleged enhancements to L.'s life by being closer geographically to family members are overstated and ought not outweigh the value to L. of having a close and day-to-day relationship with his father and his two half-brothers. The Respondent

suggests that the Applicant decided early in the year to move to Victoria and points to the fact of L.'s enrolment in elementary school in April as evidence of this. He suggests the Applicant has not made serious attempts to gain employment in Whitehorse and says that with her superior qualifications and experience, and given the considerable number of job opportunities with both the Territorial and Federal governments here, she should have no difficulty in securing suitable employment.

[11] Further, the Respondent also submitted that Whitehorse is an active cultural and sporting community, with a wide range of activities that are readily available and easily accessible and would offer L. as many or more opportunities than Victoria for extra-curricular involvement.

[12] Finally, the Respondent referenced a "Report of Psychological Consultation" prepared for the Court and filed on March 22, 2007, specifically highlighting what he considers to be relevant passages of findings made by an objective third party. The author of the report, Nicole Sheldon, made a number of observations and recommendations including the following:

> "It is strongly recommended that neither parent relocate from Whitehorse without the express written consent of the other parent. A move of this nature could potentially be unsettling to [L.] who has a strong connection to both of his parents."

ANALYSIS

[13] I have reviewed the *Children's Act,* R.S.Y. 2002, c. 31, and caselaw provided to the Court. The leading case on "mobility" in the context of custody and access is *Gordon* v. *Goertz* [1996] 2. S.C.R. 27, which sets out the following principles to be applied in considering an application to relocate at paras. 49 and 50:

“1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on 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.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, *inter alia*:
    (a) the existing custody arrangement and relationship between the child and the custodial parent;
    (b) the existing access arrangement and the relationship
    between the child and the access parent;
    (c) the desirability of maximizing contact between the child
    and both parents;
    (d) the views of the child;
    (e) the custodial parent’s reason for moving, only in the
    exceptional case where it is relevant to that parent’s ability to meet the needs of the child;
    (f) disruption to the child of a change in custody;
    (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new? ”

[14] Before the Court will adjudicate on the merits of the proposed relocation, the first hurdle for the Applicant on an interim application is meeting the threshold requirement of establishing a material change in circumstances. The Court must be satisfied that there has been “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; that the change materially affects the child; and that the change is not something that was or reasonably could have been foreseen and contemplated by a judge who made the initial order. ” (*Gordon* v. *Goertz*, supra, at para. 13)

[15] I am satisfied that the Applicant’s unemployed status is a change which affects the ability of the parents to meet the needs of the child, who is or will be materially affected if the Applicant’s status continues. As well, granting the removal order would clearly result in a drastic reduction of contact with the Respondent, which would constitute a material change in circumstances affecting the child. Although there have been previous non-removal orders in this case, there have been no previous applications for removal, and it appears that these orders were made as a precaution. I therefore find that the change here was not foreseen or reasonably contemplated by the judges who made the previous non-removal orders. Thus, the relatively low burden of satisfying the threshold requirement has been met by the Applicant.

[16] I now turn to a consideration of the merits of the application.

[17] It will often be in the best interests of a person to relocate in order to go to a job with better pay and prospects of promotion, and this more so where the person is unemployed in his or her present location. It does not necessarily follow that relocation will always be in the best interests of the child where the move will entail a drastic

reduction in the role that one of the parents plays in the life of the child as a result of greatly reduced access. It must be remembered that this is not a case where the Applicant has sole custody of the child and the Respondent has access. The parties here have joint custody and equal, shared parenting rights. There are, however, legitimate circumstances where the economic advantage to a custodial parent of relocating will be found to be in the best interests of a child. (*Burns v. Burns* 2000 NSCA 1; *Baxter v. Baxter*, 2004 YKSC 56; *L.B. v. K.L* 2006 YKSC 56).

[18] Having reviewed the evidence here, I am not persuaded that, at this time, it is in the best interests of L. that the relief sought by the Applicant be granted. Although she is currently unemployed, with her background, education and experience, I cannot help but think this is a temporary situation. The qualifications that recommend her for employment with the Government of British Columbia would be equally attractive to the Governments of Canada and Yukon here. As well, she would have opportunities in Yukon to do contract consulting which may not be available to her in the south where her work experience would not be well known. Further, although the outlook for employment in Victoria may be positive, the Applicant does not actually have a job secured and, should she not receive the hoped for job offer, she would be in no better position economically than she is here. (see *Cameron v. Cameron*, 2006 NSCA 76, (Carswell NS 251). Even if the Applicant were to receive a job offer in Victoria, I would not be inclined to grant her the relief requested on an interim application given the evidence before me.

[19] While the Applicant's evidence concerning family supports, schooling, and extra-curricular activities is not to be discounted, at this time it is outweighed by evidence that it is in the best interests of L. to maintain a close relationship with both parents. The

Applicant has suggested that the Respondent could have up to 140 days of access a year. This is somewhat fanciful considering that the majority of that access would, of necessity, be in Victoria. As well, for the most part, instead of the Respondent's interaction with L. being in his own home and with Z. and M., it would take place in circumstances where he was always the visitor from afar and would therefore drastically alter the father/son relationship and do violence to the principle of the desirability of maximizing contact with both parents. Relocation would also be very disruptive for L. as he would be removed from the community that he has come to know and, more importantly, he would be deprived of the one half of his life that he spends with his father and the time he shares with his half- brothers.

[20] I have reviewed the psychological consultation or "home study" report referenced earlier and found it to be most useful. The author's work appears to be very thorough and insightful. From my review of the material this report is the only objective evidence available. Accordingly, this being an interim application, at this stage I place considerable weight on the recommendation that relocation could be potentially very unsettling to L., who has a strong connection to both parents. I am mindful that this report is 18 months old and that circumstances may have changed, resulting in changes to previous recommendations. However, at this point in time, this is the best evidence available to the court and, on the whole of the evidence, I find that the Applicant has not established it is in the child's best interests to grant the order to relocate.

[21] After having reviewed all material on file and hearing the parties, I am of the view that litigating their issues through a series of motions with multiple, conflicting affidavits has been detrimental to their well-being and that of L., and that continuing on in the same

fashion will only perpetuate the situation and deepen the chasm that exists between them. I have given serious consideration to setting this matter down for trial as a potential means of addressing the underlying issues squarely and comprehensively, with a view to ending the cycle of litigation. However, given the Respondent's position at the hearing that he was no longer asking for a trial and, having dealt with the issue of relocation, I am declining to set this matter down for trial and will leave it to the parties to take steps to do so should they feel it advisable or necessary.

[22] In referencing a potential trial, I must register my hope that this will not be necessary and that the parties will resolve any differences they have out of court. From my review of the material on file, it is clear that the parties do share some common ground. Both acknowledge that the other is a caring, loving and devoted parent with L.'s best interests at heart. The parties also acknowledge that it is in L.'s best interests to maintain a meaningful relationship with both of them and to have them both play a major role in his life. There is little doubt that the parties have different personalities and different parenting philosophies and these factors, as well as perhaps residue from the break up of their relationship, have led to the friction which this Court has been called upon repeatedly to resolve. The parties have, over the past five years, expended great amounts of time, energy and resources in what has become a battle of affidavits and I have little doubt that the levels of frustration are extremely high and both parties desire to see an end to this cycle. I would again observe that it certainly is not in the interests of the child, L., to continue to be at the center of this ongoing dispute and to have to be a witness to acrimonious exchanges and negative emotions exhibited by the parents whom he both loves.

[23] This is a case where the court can benefit from as much independent evidence and assistance as is available. I note that, as outlined earlier in this judgment, there have been a number of significant developments concerning the nature of the interactions between the parties, the actual experience of the joint custody/shared parenting arrangement, and the fact that L. and his half brothers are older and have no doubt grown as individuals. Given this application and the issues between the parties, I am of the view that much could be gained by having an investigator take a “fresh look” at this matter. Therefore, pursuant to s. 43 of the *Children’s Act*, the Court requests that the Director of Family and Children’s Services for the Government of Yukon cause an updated investigation to be made and to report to the court on issues relating to the question of relocation, access schedules and shared parenting. Specifically, it would assist the court to know:

(1) if there have been material changes in circumstances since the report of February 26, 2007;

(2) whether there are any modifications that should be made regarding previous observations or assessments; and

(3) whether there are substantive or new recommendations that should be placed before the Court.

[24] I note that Nicole Sheldon wrote the previous report and it may make practical sense for her to do the update. However, this would be subject to her availability and perhaps other considerations which I will leave to the Director to weigh.

[25] In anticipation of the parties wishing to travel with L. outside of the jurisdiction, I feel it appropriate in all of the circumstances to require that a court order be obtained.

Should the parties agree on the proposed travel, given the proficiency both parties have demonstrated in preparing court documents as unrepresented litigants, it would be a relatively simple matter for one of them to draft an order setting out the terms of travel, obtain the written endorsement of the other party on the draft, and submit it to the Court for approval.

CONCLUSION

[26] I conclusion, I order the following:

1. The Application of the mother, T.E.H., to relocate with the child L. to the City of Victoria, Province of British Columbia is denied;
2. Neither party shall be at liberty to remove the child L. from this jurisdiction except by Order of this Court.
3. Costs of this application shall be in the cause.

[27] The Court also recommends pursuant to s. 43 of the *Children's Act* that an investigation be undertaken by a person appointed by the Director of Family and Children's Services and an updated report filed for the assistance of the court as described in paras. 23 and 24.

Cooper J.