IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Baxter* v. *Benoit,* 2004 YKSC 56

Date: 20040810
Docket: S.C. No. 03-B0030
Registry: Whitehorse

Between:

TRACEY ALLEN BAXTER

Plaintiff

And

AMANDA ELIZABETH BENOIT

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

James van Wart	For the Plaintiff
Lynn MacDiarmid	For the Defendant
Peter Morawsky	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION:

[1] The plaintiff father applies for permission to move to Nova Scotia with his two daughters, aged 7 and 9. This will require a variation of a previous order of this Court which granted joint custody of the children to both the father and the defendant mother, as well as providing that the children reside with the mother approximately 40% of the time. The mother opposes the application and asks that it be dismissed with costs. The father seeks the earliest possible decision from this Court, as time is of the essence. I have attempted to meet that request, but, as a result, these reasons are not as comprehensive as they otherwise might be.

ISSUES:

[2] There are two issues:

a) Has there been a material change in circumstances that affects or is likely to affect the best interests of the children, as required by s. 34 of the *Children's Act*, R.S.Y. 2002 c. 31?

b) If the threshold question of a material change in circumstances is answered in the affirmative, would it be in the best interests of the children to permit the move?

MATERIAL CHANGE IN CIRCUMSTANCES:

[3] On the threshold question, the law is set out in the leading case of *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27, [1996] S.C.J. No. 52. At paragraph 13 of that case, Madame Justice McLachlin, as she then was, said:

> … 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.

[4] Madame Justice McLachlin went on to say in the following paragraph:

> … Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the

> circumstances of the child and the ability of the parent to meet them.

[5] On the evidence before me, which I will discuss in greater detail later, I am satisfied that the first two criteria for the threshold test have been met. What remains in issue is whether the father's move to Nova Scotia was foreseen or could have reasonably been contemplated by the Court at the time of the last custody order, which was made September 18, 2003. That order was preceded only by the father's first affidavit. The mother filed nothing in response. I am advised by counsel that the order was essentially on consent. Accordingly, I will refer to it here as the "consent order". It provided that the parties would share joint custody and guardianship of the children, but that the primary residence of the children would be with the father. It also provided that the children would reside with the father approximately 60% of the time and with the mother approximately 40% of the time. Finally, it provided that the children would specifically reside with the mother:

(a) on Monday and Wednesday each week from after school or day care until 8:30 p.m.;

(b) each weekend from Friday afternoon to Saturday at 6:00 p.m.;

(c) on long weekends, until Sunday at 6:00 p.m.; and

(d) for one half of every school holiday.

[6] Prior to the hearing before me the father filed his second, third and fourth affidavits and the mother filed her first and only affidavit. The parties were cross-examined on their respective affidavits on July 28, 2004, and transcripts have been filed

with the Court. The father testified in his cross-examination that he has been considering moving to Nova Scotia with the children for a year or two. Further, that since his mother turned 61 she has advised him that he could take over her job as a mail carrier for Canada Post in the community where she resides in Cape Breton. In fact, in his third affidavit, the father provided a letter from Canada Post dated February 27, 2004, confirming that he "will be taking over [his mother's] position when she retires" and that his mother is currently earning $30,000.00 per year. The father also testified in cross-examination that at some point he told his mother that perhaps she should give the Canada Post job to his younger sister, but that she did not want it. At some point prior to filing his current application on April 1, 2004, the father apparently made the decision to accept his mother's offer, if allowed by this Court.

[7] It is not clear from the evidence that the father had made this decision prior to the date of the consent order. Clearly, there is nothing on the Court record to indicate that was the case. The mother's counsel argued that this Canada Post opportunity had to be in the minds of both parties, as well as the consequent risk of a potential move to Nova Scotia, and that this was the case at the time the consent order was obtained. Unfortunately, that submission requires pure speculation as to what was in the mind of the mother at the time of the consent order. She filed no affidavit material prior to that order and there is no indication in any of the other evidence, including her cross-examination, that she then contemplated the father moving to Nova Scotia for that purpose.

[8] Had the father made his decision to attempt to move to Nova Scotia with the children for the Canada Post job prior to the filing of the consent order, but for some

tactical reason failed to advise the mother of that fact, then I would have much greater difficulty with this threshold test. However, I feel compelled to reject that possibility as it would appear to be entirely illogical. Why would the father consent to an order which specifies that the children will reside in Whitehorse, if he indeed contemplated making an application, on which he would bear the initial onus of proof, to change that order only a few months later?

[9] In any event, what is clear is that this prospective move was not foreseen *by the Court* at the time of the consent order, nor could the Court have reasonably contemplated that fact, as there was absolutely no evidence of it from either party.

[10] On the contrary, the consent order stipulated terms of residence for the mother on the assumption that the children would reside in Whitehorse, where both parties were living. In this regard, I agree with the Child Advocate that the father's application would seem to fit squarely within the circumstance considered by Madame Justice McLachlin at paragraph 16 of *Gordon*:

> Conversely, an order which specifies precise terms of access may lead to an inference that a move which would "effectively destroy that right of access" constitutes a material change in circumstances justifying a variation application … Where, as here, the custody order stipulates terms of access on the assumption that the child's principal residence will remain near the access parent, the third branch of the threshold requirement of a material change in circumstance is met.

[11] I conclude that the father's decision to move to Nova Scotia with the children constitutes a material change in circumstances since the consent order was made.

[12] The father's counsel submitted that there are two additional reasons why I should find there has been a material change in circumstances. First, that the children have resided with the mother far less than 40% of the time, as required by the consent order; and second, that the mother admitted in her cross-examination that she is currently seeking employment in her field in a number of Yukon communities outside of Whitehorse, which will result in even less opportunity for the children to reside with her. I do not find it necessary to deal with these two points on the threshold issue, as I am already satisfied that there has been a material change in circumstances without considering them. However, I will return to these points later in the discussion of whether the move would be in the best interests of the children.

THE BEST INTERESTS OF THE CHILDREN:

[13] I must now go on to consider what is in the best interests of the children, having regard to all the relevant circumstances relating to their needs and the abilities of the respective parents to satisfy them. In that regard, I am directed by the law as summarized by Madame Justice McLachlin at paragraphs 49 and 50 of *Gordon*, as well as ss. 30(1) and (4) and ss. 33(1) and (2) of the *Children's Act*, cited above.

[14] I will approach the points raised in *Gordon* by Madame Justice McLachlin, which are most pertinent to this application.

***Gordon* says that this 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.**

[15] Pursuant to the consent order, both parents share custody and guardianship of the children, although the father was awarded primary residence and the children were

required to reside with him approximately 60% of the time. In fact, the evidence suggests that the children have resided with the father significantly more than 60% of the time. In his third affidavit he deposed that since the consent order was made he has maintained an access journal. “Access” is a misnomer here as the mother was awarded joint custody and shared residence, and not access to the children. Keeping that in mind, the father deposed that the mother did not exercise her “specified access” on the following occasions:

1. for seven days in September 2003;
2. for six days in October 2003;
3. for seven days in November 2003;
4. for six days in December 2003;
5. for nine days in January 2004;
6. for two days in February 2004; and
7. for ten days in April 2004.

[16] Although both parties seem to acknowledge that the mother’s performance in taking the children significantly improved in March 2004, she is still choosing not to take the children overnight. In her cross-examination on July 28, she testified she is presently taking the children only on Mondays and Wednesdays and on occasional Saturdays, but not overnight. There is no further evidence of her time with the children from April 2004 to date.

[17] Therefore, I find that the father is tantamount to being in the position of a custodial parent, as described in *Gordon*, where Madame Justice McLachlin said at paragraph 48:

> While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

With respect to the existing arrangement and relationship between the children and the father, as the effective "custodial parent", the evidence is positive.

[18] Although the mother deposed in her affidavit that she has concerns about the father's care of the children, including health, safety and discipline issues, she was unable to expand on that in any significant way in her cross-examination. It appears to be common ground that the parents have different parenting styles and different household rules. However, it has not been alleged that the father's rules and parenting style is contrary to the children's best interests. The mother testified that the older daughter had a problem with a number of fillings recently, however it appears that those have been addressed by the school dentist. The mother also alleged that the father was not properly caring for the younger daughter's eczema problem, but again she failed to elaborate. With respect to safety issues, the mother alleged that there was a boating accident in Nova Scotia where the daughters were not wearing life jackets and the older daughter almost drowned. However, this was not elaborated upon and the source of the mother's information on the point was not identified. The other safety issue raised by the mother was an occasion when the younger daughter fell off her bike and hurt herself. That seems to me to be an expected circumstance in raising young children. In short, I have no difficulty in concluding that the father's relationship with the children is a positive and caring one.

Next I must consider the existing "access" arrangement and the relationship between the children and the mother.

[19] Here the mother testified in her cross-examination that there have been some difficulties between her and the children. After the consent order was made she said there was a period of about four months where the children would regularly indicate that they wanted to return home to their father. She also said that "they would misbehave, just so they would go home – or I would take them home early". The mother complained in her testimony on cross-examination that the children failed to abide by her rules of the house. However, she acknowledged that she contacted the father several times about this and that he did talk to the daughters about listening, following rules, doing homework and that sort of thing, all in a positive way.

[20] I also heard submissions on this point from the Child Advocate. He correctly noted there is no direct evidence before the Court as to the views of the children, but that I can draw an inference from the fact that the mother continues to this day not to take the children overnight. In particular, he says that I may conclude that there is some lack of desire by the children to spend time overnight with their mother. Indeed, it is part of the mother's own evidence that the children have previously indicated, during periods when they were to reside with the mother, that they would prefer to remain with their father.

[21] There was also a reference in the mother's cross-examination to disciplining the children by hitting both of them with the belt on a single occasion in the summer of 2002. While that incident is now dated and may have been a singular overreaction, it is interesting to note that just prior to being specifically asked about the belt incident, the

mother was asked about her opinions on corporal punishment, and replied somewhat inconsistently:

> I do have opinions of it. Do I use it? Absolutely not.

[22] The mother's counsel argued that things have improved significantly between the mother and her daughters and that, consequently, this would be the worst possible time to authorize a move to Nova Scotia. On the other hand, the mother herself has testified in cross-examination that she is currently seeking a full-time management position in Mayo, a community some four or five hours drive from Whitehorse. She has also submitted applications for similar jobs in other communities such as Old Crow, Carcross and Watson Lake. Watson Lake is also approximately four or five hours from Whitehorse and Old Crow is only accessible by air. While I do not begrudge the mother pursuing her professional career options to the fullest, I do find it somewhat strange that she would seek to do so in a manner which would inevitably result in decreased time with her children, especially when she claims to be at such a revitalized point in her relationship with them.

I must next consider the desirability of maximizing contact between the children and both parents.

[23] While maximum contact is clearly desirable, it is not a paramount consideration: *Gunderson* v. *Thompson*, 2004 YKSC 44, at paragraph 33.

[24] It is also important to remember that there have been times in the past when the children have resided with either parent in a community apart from the other. In particular, they were in the father's primary care from August 1999 to October 2000 in

Whitehorse, while the mother attended school in Ontario. Then they resided with the mother from October 2000 to April 2002, while the father was living in other areas, including Nova Scotia. They then returned back to the father's primary care in Whitehorse from August 2002 to April 2003, while the mother finished her education in Ontario. In short, they are not unaccustomed to being apart from one parent or the other, and there is no specific evidence that they have been unduly traumatized or adversely affected by these periods of separation.

Next I must take into account the father's reason for moving, insofar as it is relevant to his ability to meet the needs of the children.

[25] Clearly the main reason for the father's move is to attempt to take over his mother's postal route with Canada Post, for which he expects to earn approximately $30,000.00 per annum. In his cross-examination he testified that he expected certain medical and dental benefits, as well as a pension. However, there is no independent evidence confirming that would be the case. What the father did say in his second affidavit is that he would work at the job for two years as his mother's "subcontractor", to demonstrate that he has a Nova Scotia driver's licence for that period and then he would be able to formally take over the contract. That would of course follow an initial period of training by his mother, which presumably would be unpaid time. However, as I understand the father's evidence in paragraph 9 of his second affidavit, if he is working as a subcontractor to his mother, then he would be paid during that time.

[26] In addition, in his fourth affidavit the father attached a letter from a cousin who is prepared to hire him as a full-time dry waller on his return to Nova Scotia. The father's evidence is that he expects to be able to do the dry walling work as a second job after

he is finished his Canada Post route, which he expects would only take him until the early to mid afternoon each day. Therefore, he anticipates his income will be in excess of $30,000.00 per annum, compared to what he presently earns in Whitehorse, which is in the $23,000.00 per annum range.

[27] I previously recognized that an increase in the financial stability of the family unit is a legitimate reason for moving directly related to the best interests of the children: *Gunderson*, cited above, at paragraph 28; and *Murphy* v. *Murphy*, [2002] Y.J. No. 13 at paragraph 52.

[28] Also, the father owns land, next door to his mother's property, which is free and clear. On that land is a house which would be suitable for habitation with his children after approximately $2,000.00 worth of work is completed. If he is unable to do that work before this coming winter, then he anticipates renting or residing with friends or relatives in the immediate area.

[29] There is also a school, approximately two miles from the father's proposed residence, which the children could attend.

[30] Finally, if the father does take over his mother's postal route, then she would be available to look after the girls while the father is working, saving him the expense of placing them in daycare.

[31] As well, the father has other family in the immediate Cape Breton area including his father, his sister, two first cousins, and a number of second cousins. Indeed, it is interesting to note that the mother also testified that she has a grandmother and aunts

and uncles in Cape Breton, although she has not maintained a close relationship with them.

[32] In short, I am satisfied that this is an exceptional case where the father's reason for moving is relevant to meeting the needs of the children.

I must also recognize that there will inevitably be a disruption to the children if their custodial status is changed and they are removed from their family, school, and friends in Whitehorse.

[33] However, I repeat that the children are accustomed to living with either one parent or the other at different times in the past without apparent adverse impact. Also, this Court has previously recognized that children can adapt to disruption: *Murphy,* cited above, at paragraph 53.

CONCLUSION:

[34] Applications by parents to move their children to the exclusion of the other parent are referred to as "mobility cases". They are rarely easy for the courts to decide. This case is no exception. However, I am satisfied that the balance of the considerations I have just been through weigh in favour of allowing the father's application.

[35] As for the period of time during which the children will reside with the mother, the father's counsel suggested in argument that a period of four to six weeks each summer would be appropriate, as well as every second Christmas holiday. The parties have been less than clear as to who should bear the cost of the mother's access. The father said at one point in cross-examination that he would be prepared to cover half the cost, but also said he would be prepared to get them as far as Edmonton if necessary.

According to the father's evidence, the mother has refused to share the cost of access. However, in her cross-examination the mother acknowledged that if she is able to obtain the employment she is seeking in the salary range of $45,000.00 to $50,000.00, she could contribute towards the cost of access to the children.

[36] The father has not made an application for child support at this time. If the mother obtains the employment she seeks, then pursuant to the *Yukon Child Support Guidelines*, she could become liable to pay child support for both children in a range from approximately $600.00 to $700.00 in total per month. If such an order were made, then the father's ability to completely cover the cost of access would be increased significantly. However, for the moment the mother is presently receiving a limited income through employment insurance benefits in the amount of $1,400.00 per month or $16,800.00 per annum. Even at that rate, the mother could become liable to pay child support for both children of approximately $170.00 in total.

[37] I fully expect that the parties will engage in further discussions about the cost of the children traveling between Nova Scotia and the Yukon, as well as the issue of child support. However, in the meantime I am prepared to make an order to give the parties some certainty as to the state of affairs. In particular, I order that the consent order be varied by deleting paragraphs 5 and 6. I further order that

1. The father is permitted to remove the children from the Yukon to Nova Scotia.

2. The children will reside primarily with the father in Nova Scotia.

3. The mother will have reasonable and generous access to the children at the following times and places and in the following ways:

(a) in the Yukon for six weeks during every summer school vacation commencing in 2005. The father will bear the full cost of the transportation of the children for that purpose each year;

(b) in the Yukon for the full Christmas vacation in alternating years, also commencing in 2005. The mother and father shall share equally in the cost of the transportation of the children for that purpose;

(c) by ordinary mail, telephone, e-mail and by “web cam” computer contact; and

(d) such other reasonable access as may be agreed upon by the parties from time to time.

[38] The father did not seek costs in his application and none are awarded.

[39] If I have omitted dealing with any issues, or if either party requires further direction on any point, they may arrange with the trial coordinator for a further appearance before me for that purpose.

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GOWER J.