IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Armitage* v. *McCann,* 2004 YKSC 58

Date: 20040902
Docket No.: S.C. No. 02-D3509
Registry: Whitehorse

Between:

DONALD HARVEY ARMITAGE

Petitioner

And

KAREN ELIZABETH MCCANN

Respondent

Before: Mr. Justice R.S. Veale

Appearances:
Debbie P. Hoffman — Petitioner
Karen E. McCann — On her own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a high conflict custody dispute. Both parents have left the Yukon and are making an application for custody of their two children. Mr. Armitage resides near Victoria, British Columbia, and Ms. McCann resides near Kingston, Ontario.

ISSUE

[2] Which parental move from the Yukon is in the best interests of the children?

BACKGROUND

[3] There are three previous written judgments in this matter. In *Armitage* v. *McCann,* 2004 YKSC 01, I ordered interim joint custody of the children to the parents with alternating care and control to each parent for one week. As is the practice in this court, I am seized of this matter.

[4] The parties were married on July 3, 1993, in British Columbia, after they had resided together in Dawson City, Yukon Territory, since 1989. They returned to the Yukon in 1995 and began constructing a home outside Whitehorse.

[5] The eldest child was born in August 1990 and the youngest was born in November 1992.

[6] Their relationship was a volatile one with numerous separations based on financial stress and drugs and alcohol use, although I have found both parents to be loving and responsible parents. They separated in January 2002.

[7] Matters came to a head on November 28, 2002, the day Mr. Armitage filed his divorce petition. He got into a shoving match and assaulted Ms. McCann. He was charged with assault, entered a guilty plea and participated in the Domestic Violence Treatment Option Program. This program, in the Territorial Court, pursues treatment of the offender as an alternative to trial. When the treatment is successfully concluded, a stay of proceedings is entered. Mr. Armitage completed the Spousal Abuse program from May 5 to July 14, 2003. His treatment option report dated July 22, 2003 stated that he was at low risk to reoffend and was truly concerned about resolving his issues and creating a healthy future for himself.

[8] The initial custody application was heard on July 24, 2003. I had a great deal of concern for both Mr. Armitage's assaultive behaviour and for Ms. McCann's continued denial of access before and after the assault on November 28, 2002. The denial of access was not for protection of the children but arose from Ms. McCann's anger with Mr. Armitage. I did not make a joint custody order but rather a parallel parenting order that gave Ms. McCann care and control from Tuesday at 9:00 a.m. to Saturday at 5:00 p.m. and Mr. Armitage care and control from Saturday at 5:00 p.m. to Tuesday at 9:00 a.m. That allowed Mr. Armitage to complete the Spousal Assault Program and a further period to assess Ms. McCann's willingness to facilitate access to Mr. Armitage, which she had no objection to from a parental perspective.

[9] In the meantime, Mr. Armitage confronted his assaultive behaviour but Ms. McCann remained bitter and exceptionally combative with respect to Mr. Armitage and any additional time he requested with the children. It came to a head in October 2003. Although she always maintained that the children objected to additional access by Mr. Armitage, it was always Ms. McCann who opposed.

[10] Mr. Armitage applied for two additional days of care and control to allow him to take his children to a family reunion in British Columbia. The Child Advocate approved the trip, as the children had not raised any objection when she spoke with them previously. Ms. McCann objected on the grounds that the children were concerned about their schoolwork.

[11] For greater certainty, I asked the Child Advocate to meet again with the children to determine if they had any concerns about the proposed trip. Ms. McCann deliberately made arrangements to speak to the children before the Child Advocate could. The Child

Advocate reported that the children now expressed the view that they did not want to go on the trip because of their homework. At the time, I considered the conduct of Ms. McCann quite shocking. I ordered that Mr. Armitage could take the children to British Columbia to attend his family reunion.

[12] Ms. McCann's conduct went from shocking to contemptuous. She violated this Court's order by taking the children out of school on the day Mr. Armitage was to pick them up and on the following day took them to a child care worker to advise that they did not want to go to British Columbia. As a result, Mr. Armitage and the children were unable to make the trip. The Child Advocate resigned because the children were reluctant to see her and when they did, she felt she was only hearing what Ms. McCann told them to say. The children now have no advocate to represent their interests. This is the result of the conduct of Ms. McCann.

[13] As I was satisfied that spousal violence was not a factor in terms of Mr. Armitage's relationship and parenting ability with the children, I ordered interim joint custody with each parent having care and control of the children in alternate weeks.

RECENT EVENTS

[14] Mr. Armitage exercised his summer access with the children in British Columbia for the month of July. Ms. McCann's access to the children is from August 5 to September 13, 2004. Ms. McCann has travelled to Ontario with the children to be with her extended family near Kingston, Ontario. Both parents have made plans to leave the Yukon.

[15] Mr. Armitage filed his application to vary custody on August 19, 2004. I had previously ordered both parents to file their applications, if they intended to leave the

Yukon, no later than August 20, 2004, in order that submissions could be heard on August 27, 2004. Ms. McCann did not file her material but advised the court on August 27, 2004 that she intended to remain in Ontario. She was granted an adjournment to file her material on August 30, 2004, for a hearing date of August 31, 2004. Mr. Armitage filed a reply affidavit on August 31, 2004. Ms. McCann claimed she did not receive it, although counsel for Mr. Armitage indicated that it was e-mailed and faxed to Ontario at the address and number provided by Ms. McCann. I have not relied upon Mr. Armitage's recent affidavit except for the update on his housing and school plans for the children. In other words, I have not relied upon Mr. Armitage responses to Ms. McCann's affidavit of August 30. 2004.

MR. ARMITAGE'S PLANS

[16] Mr. Armitage has moved to Mill Bay, a small community some forty minutes by car north of Victoria, on Vancouver Island. He has obtained employment at Brentwood College School, a private school that has day and residential students. He proposes to enrol the older boy, who is in grade 9, at Brentwood as it has a strong artistic program in addition to academic and athletic programs. This is significant as both parents have a strong arts background and have always been employed in the arts field.

[17] He wishes to enrol his younger son, who is in grade 7, at a middle school in Mill Bay. It is located fifteen minutes from the home that Mr. Armitage has rented. The younger son could also attend Brentwood College when he is older.

[18] Mr. Armitage has his parents and extended family in British Columbia and the children have a relationship with them from past visits.

[19] Mr. Armitage has grown closer to his children during the past seven months when he has had them on a 50 – 50 basis. The children's relationship with his partner has also improved, especially during the month of July when they were on holidays in British Columbia. He noted that the older son's complexion problem cleared up although it broke out again the day before returning to Whitehorse to his mother's care and control. He stated that his younger son said he was going to Kingston "to look after his Mom", a stressful role for a young boy.

MS. MCCANN'S PLAN

[20] Ms. McCann, who has very capably represented herself in recent applications, is moving to a rural area, 25 kilometres from Kingston, Ontario. She has no job or plans to further her education at the moment but will obtain work in the arts field once the boys are settled. She left the Yukon because she had no reasonable prospects of employment or further education in her field.

[21] She is presently living with her parents near Kingston and she has extended family in or near the Kingston area. She has made arrangements to lease a home near Kingston. Her younger son would attend a small rural elementary school, a 12-kilometre bus ride from their new home. He has a cousin in the same grade who would attend on the same bus.

[22] She will enrol her older son at a high school in Kingston, which another cousin also attends. Her son will attend by bus along with his cousin.

[23] Apparently, both schools will allow the children to continue French Immersion.

[24] As both parents have moved from the Yukon, the threshold material change in circumstances has been met.

DECISION

[25] Counsel for Mr. Armitage and Ms. McCann made submissions based upon the law as established in *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27. That case states that once the threshold is met, the court must embark on a fresh inquiry into what is in the best interests of the children. The inquiry is based upon the findings of the previous order and the evidence of new circumstances. In particular *Gordon* v. *Goertz*, para. 49, directs the court to consider:

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.

As to paragraph (g), both parents have moved from the Yukon. Some disruption will occur either way as it is not an option for the children to remain in the Yukon.

[26] The existing custody arrangement was based on caring for the children on a 50 – 50 basis alternating each week. In my view, this was a better arrangement than the previous order where the children spent a larger amount of time with Ms. McCann. Neither parent has ever challenged the fact that the children love both their parents although Mr. Armitage has advocated for a 50 – 50 sharing while Ms. McCann has sought custody with access to Mr. Armitage.

[27] There is no doubt that the children have an equally strong bond with each of their parents, particularly as the conflict between their parents has subsided somewhat. I say somewhat because the parents still spend a lot a time arguing about matrimonial property and debt issues, largely by e-mail. I also find that the bond of the children to Mr. Armitage would not be as strong if left to the wishes of Ms. McCann. Before the court became involved and after, Ms. McCann sought to limit Mr. Armitage's time with his children, always professing to be promoting the wishes of the children.

[28] However, it was Ms. McCann who shamelessly influenced the children to take her negative view of Mr. Armitage's applications for more time with his children. I have found that she not only attempted to influence the children but she actively undermined the Child Advocate who ultimately resigned because she was not able to obtain the independent views of the children. The result is that these intelligent and thoughtful boys will not able to express their views on the very different proposals for their future. While Ms. McCann submitted that I should meet with the boys, I am not convinced that I would hear their independent views in the circumstances.

[29] Each parent has a reasonable plan for the children. However, I find that Mr. Armitage's has a little more permanence in that he has a job and came forward with his

plan as early as late July while Ms. McCann's plans were not made known until the end of August, although she clearly made up her mind to leave the Yukon at a much earlier date. I do not find fault with either parents' desire to move, given their toxic relationship. But Mr. Armitage has definitely made a firmer and more stable plan for the financial support and education of the children.

[30] Both parents say they desire maximum contact for the children with the other parent. There is no doubt that the children love both parents and want to spend time with each. However, I am convinced that Mr. Armitage will deliver on this promise more than Ms. McCann. Ms. McCann has shown no flexibility in accommodating additional time for the children with Mr. Armitage even where it was a matter of two additional days of access to attend Mr. Armitage's family reunion.

[31] I conclude that it is in the best interests of these two boys to be in the joint interim custody of both parents with their primary residence being with Mr. Armitage in British Columbia. Thus, Mr. Armitage will have the care and control of the boys except for the following time when Ms. McCann will have care and control, if exercised:

1. Thanksgiving weekend and Spring Break.

2. Ten days each Christmas holiday, alternating Christmas day each year, starting with Christmas 2004 with Ms. McCann. It may be necessary for the boys to miss some school to accommodate the ten days for Ms. McCann when the boys have Christmas day with Mr. Armitage.

3. Five consecutive weeks each summer commencing the week after school finishes.

4. At any time Ms. McCann and the boys will be in the same province or territory and Ms. McCann gives 48 hours notice to Mr. Armitage, such care and control not to exceed one week, except by agreement.

5. As no child support will be paid by Ms. McCann in the near future, she will bear the costs of exercising access. This may be revisited if Ms. McCann begins to pay child support.

[32] As this court has ordered that the children should remain with Ms. McCann until September 13, 2004, I now order that she return the boys to Mr. Armitage in Victoria on September 13, 2004 rather than the Yukon as previously ordered.

[33] There shall be a new order filed replacing the order of January 5, 2004, with the following terms in addition to those set out above:

1. Communication between Ms. McCann and Mr. Armitage will be by e-mail, will address only issues related to the children and will be stated in language that is respectful of the dignity of the party being communicated with.

2. The children shall participate in such extra-curricular activities as Mr. Armitage and Ms. McCann may agree, and the cost of such activities shall be paid by Mr. Armitage. If there is no agreement with respect to the extra-curricular activities, then each parent will support the children separately to participate in those extra-curricular activities pursued when the children are in the care and control of that parent.

3. Ms. McCann shall have telephone access to the children on Tuesday and Friday nights at 7:00 p.m. for thirty (30) minutes when the children are in the care and control of Mr. Armitage; and Mr. Armitage shall have telephone access to the children on Tuesday and Friday nights at 7:00 p.m. for thirty (30) minutes when the children are in the care and control of Ms. McCann.

4. Neither Mr. Armitage nor Ms. McCann shall consume alcohol or drugs while the children are in his or her care and control.

5. The parent who has the care and control of the children shall have the obligation to advise the other parent of any significant events that take place with respect to the children. Telephone communication may be used by either party in the case of an emergency.

6. Each parent shall have the obligation to discuss significant decisions concerning the health (except in emergencies), education, religious instruction and general welfare of the children with the other parent. If the parents cannot reach an agreement, either party may apply to this Court for a further Order.

7. Each parent shall have the right to obtain information concerning the children directly from third parties including teachers, counsellors, medical professionals and third party caregivers.

8. The Royal Canadian Mounted Police, or any other peace officer having jurisdiction, may take such reasonable steps as they deem necessary to

enforce the terms of this Order including, without limiting the generality of the foregoing, if the children are not returned to Victoria, British Columbia, on September 13, 2004. A Peace Officer having jurisdiction anywhere in Canada is hereby authorized to apprehend the children and bring them to the petitioner in Victoria, British Columbia.

[34] Mr. Armitage shall have his costs of this application in the cause against Ms. McCann. This means that Mr. Armitage will only get his costs against Ms. McCann, if he is successful when the case proceeds to a final hearing. However, as the outstanding property and debt issues are not significant, I expect the matter will conclude by way of a desk order without a hearing, in which case there will be no costs paid by Ms. McCann. This cost order does not apply to necessary applications to enforce this order or my previous spousal support order.

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VEALE J.