IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Armitage* v. *McCann,* 2004 YKSC 01

Date: 20040105
Docket No.: S.C. No.: 02-D3509
Registry: Whitehorse

Between:

DONALD HARVEY ARMITAGE

Petitioner

And:

KAREN ELIZABETH MCCANN

Respondent

Appearances:
Ms. Debbie Hoffman — Counsel for the Petitioner
Ms. Karen Elizabeth McCann — Self-Represented

Before:
Mr. Justice R.S. Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for interim custody and access in what can only be described as a high conflict case. Mr. Armitage seeks interim joint custody of F. who is twelve years old and Z. who is ten years old. He also seeks equal sharing of the children in the form of alternating weeks with each parent. Ms. McCann, who has opposed interim joint custody in the past, now consents to such an order. However, she wishes to be the primary residence for the children and she wishes no change for the care and control of the children. At the time of this application, Mr. Armitage had care

and control of the children from Saturday at 5:30 p.m. until Tuesday at 9:00 a.m. Ms. McCann also seeks increased child support for extracurricular activities, spousal support and the payment of certain household bills from the proceeds of the sale of the matrimonial home. She also applies for an order limiting communication between spouses to e-mail.

CASE HISTORY

[2] Ms. McCann and Mr. Armitage were married on July 3, 1993 in British Columbia. They separated in January 2002. Their relationship began in Dawson City, Yukon, in 1989, where they both were directors of the Dawson City Music Festival. Their relationship was based upon a mutual love of the arts. However, it suffered from an excessive debt load which has carried over to the present.

[3] F. was born in August 1990 and Z. was born in November 1992. Both parents love their children very much. They moved to Whitehorse in May 1995 and began building a new home.

[4] Their relationship can only be described as volatile. Mr. Armitage describes Ms. McCann as controlling stating that he was kicked out of the house many times during their relationship. Ms. McCann on the other hand indicates that many factors led to their separation, including financial stress and Ms. McCann’s dependence on alcohol and drugs. While alcohol and drugs have been a part of both their lives, I do not find that these substances play a significant role in the relationship of these parents to their children since separation.

[5] However, substance abuse was certainly part of the past relationship particularly between the parents. It no doubt led to a very rocky and mutual emotionally abusive

relationship, which culminated in an assault charge against Mr. Armitage from an incident on November 28, 2002. The parents had been separated since January 2002. While they attempted reconciliation on numerous occasions in 2001, the relationship could not be mended and Mr. Armitage commenced a relationship with Lisanna Sullivan, with whom he now resides. Ms. McCann is very bitter about Mr. Armitage's new relationship and it has affected the children in that Ms. McCann has made access of Mr. Armitage to the children very difficult. I have found that access to the children was denied prior to and after the assault charge of November 28, 2002.

[6] The assault occurred when Mr. Armitage was at the family residence to pick up his drums and mail. There was a confrontation and Mr. Armitage grabbed Ms. McCann and pushed her against his truck. Mr. Armitage was charged with assault and entered a guilty plea and participated in the Domestic Violence Treatment Option Program. The Program is well established in the Territorial Court of the Yukon Territory. It pursues treatment of the offender as an alternative to a trial and perhaps incarceration. So long as the offender attends the treatment program, the treatment in effect becomes the sentence. However, Mr. Armitage was under a no contact order and the court monitored his treatment. When the treatment was concluded, a stay of proceedings was entered.

[7] I heard the initial interim custody application on June 24, 2003. At that time, I was concerned about the denial of access by Ms. McCann and the impact of the domestic violence on the children. In my oral reasons, I noted that a great deal of the denial of access took place before the assault charge. I was reluctant to make a joint custody order because of the embittered relationship between the parents and the assault by Mr. Armitage. At the same time, I was of the view that Ms. McCann was unreasonably

denying access to Mr. Armitage before the assault and I decided that it would not be appropriate to make any custody order but rather to wait for a report from the Domestic Violence Treatment Option Program. Thus, I made a care and control order for the children which 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.

[8] The care and control order was essentially based on a parallel parenting model to keep the parents separate and allow each parent to care for the children during their time. The parents were instructed to discuss any significant decisions about the children but if agreement could not be reached with the assistance of counsel, either party could apply for a court order. Specific longer periods of care and control were ordered for the summer. I also implored both parents, who obviously love their children, to give a lot of consideration to their conduct as it affects their children. I specifically advised against denying access to the children.

EVENTS TO DATE

[9] The summer care and control proceeded as ordered with the exception of the commencement of Mr. Armitage's care and control on June 28 to July 15, 2003. Mr. Armitage was away from Whitehorse but had arranged through counsel for his parents to pick up the children on June 28 until July 2 when Mr. Armitage returned. Ms. McCann refused to allow the children to go with Mr. Armitage's parents because she said the children did not want to. It is a recurrent theme with Ms. McCann that it is the children who determine whether they will have access with their father and that Ms. McCann is just supporting the wishes of the children. From the outset of her application filed April

24, 2003, it has been Ms. McCann's view that Mr. Armitage's access to the children should be in accordance with the children's wishes. A Child Advocate was appointed for the children on the court's recommendation made February 10, 2003 with the consent of the parents to ensure that the children's wishes would be presented to the court by a professional person independent of the parents.

[10] It was significant that when Ms. McCann was sick on September 7, 2003, she phoned Mr. Armitage to ask him to look after the children. He immediately rearranged his schedule to accommodate her wish and had the children for an additional ten days with his common law spouse, Lisanna Sullivan. It was a hopeful sign that the parents were able to cooperate on decisions about the children.

[11] On September 30, 2003, Mr. Armitage made an application for care and control of F. and Z. from October 9, 2003 to October 14, 2003 in order to attend a family reunion in Shuswap, British Columbia. He was, in effect, seeking an additional two school days to make the trip on the Thanksgiving weekend. The Child Advocate recommended the additional two days but Ms. McCann opposed the application on the grounds that the children were concerned about their schoolwork. However, the children, who are by all accounts intelligent and articulate, did not mention this when meeting with the Child Advocate previously when they were aware of their father's plans.

[12] I instructed the Child Advocate to meet with the children on the day of the court application by Mr. Armitage to determine if they had concerns about the proposed trip. Ms. McCann deliberately made arrangements to meet the children before the Child Advocate had the opportunity. The Child Advocate reported that the children having had

no comment on the proposed trip previously, now did not want to go on the trip because of schoolwork. The children did not express any concern about Mr. Armitage, his spouse or the access itself. I concluded that it was in the best interests of the children to make the trip with their father and so ordered. I directed Mr. Armitage to speak to their teachers to overcome any concerns about missing two days of school.

[13] The conduct of Ms. McCann in talking to the children before the Child Advocate had an opportunity to do so was quite shocking. However, her conduct did not improve.

[14] The children did not accompany their father to Shuswap on the Thanksgiving weekend as ordered. Ms. McCann kept the children from school on October 8, 2003, the day that Mr. Armitage was to pick them up after school in order to leave for Shuswap the next day. She took the children to a person named Aaron at the Family and Children's Services Branch of the Government of the Yukon. He informed Mr. Armitage that the children did not wish to go to British Columbia. At this point, Mr. Armitage did not wish to make things more difficult for the children and did not take them to Shuswap despite having purchased airplane tickets in advance.

[15] Ms. McCann does not dispute what occurred but simply says that it was the children's decision not to go to Shuswap. I can only conclude that this is a very serious violation of a court order orchestrated by Ms. McCann. The Child Advocate has declined to act any further in this case because the children are now reluctant to see her. She reported that when they do see her, they simply repeat to her what Ms. McCann has already related to the court as the wishes of the children.

[16] Mr. Armitage has also withdrawn his application to take the children to Shuswap for Christmas as it simply brings further stress on the children.

[17] Mr. Armitage has completed the Spousal Abuse Program held from May 5 to July 14, 2003. A stay of proceedings has been entered on his assault charge. His Treatment Option Report dated July 22, 2003 stated that he has a low risk of re-offend and concluded that “this individual is truly concerned about resolving his issues, challenging his belief systems, actively managing his thoughts, feelings and behaviours and creating a healthy future for himself.”

[18] While no report can ever say that Mr. Armitage is cured or risk free in terms of spousal violence, I am satisfied that it is not a factor in terms of his relationship and parenting ability with his children. The allegations of Ms. McCann have been directed at his new spouse and the difficulties her children have with her. What is unknown is how much, if any, of Ms. McCann’s behaviour arises from the spousal violence. What is known is that Mr. Armitage seeks more time with his children and is thwarted from doing so, even in the face of a court order. There is no evidence before me, and indeed no allegation, that Mr. Armitage seeks to have more time with his children to maintain control over Ms. McCann or to reduce his financial obligation for the children.

[19] A further order of this court was necessary to ensure that the sale of the family home was completed. The purchase and sale agreement was signed by both Mr. Armitage and Ms. McCann. It was necessary to avoid further financial losses. However, Ms. McCann was not complying with the agreement and the sale was in jeopardy. I ordered that Mr. Armitage have conduct of the sale to ensure that it closed. Mr. Armitage had agreed to pay Ms. McCann’s moving expenses from the sale proceeds. She now seeks the payment of two additional bills unrelated to the sale; a Northwestel phone bill in the amount of $442.99 and a Mitchell Petroleum bill for $541.25.

[20] Ms. McCann also seeks spousal support. She is on Social Assistance and claims that Mr. Armitage's employment at the Yukon Arts Centre prevents her from obtaining employment in the arts community. Mr. Armitage earns $45,000.00 a year and pays $633.00 per month as child support. His Financial Statement filed on November 28, 2002 indicates, after deducting child support, a balance of $206.00 monthly after expenses.

DECISION

[21] This case raises the very difficult issue of spousal violence and its impact on the issue of custody. Spousal violence is prevalent in Yukon society but it is most often lurking below the surface in family law cases. This may be because a spouse is too embarrassed to raise the issue or, in the worst case, too fearful. This is not the situation in this case.

[22] Mr. Armitage and Ms. McCann have had a volatile relationship before separation. The assault took place some eleven months after their separation in January 2002. Mr. Armitage was charged and has received treatment resulting in a stay of proceedings. In the context of spousal violence, this is a positive outcome in the sense that Mr. Armitage has had to confront his assaultive behaviour.

[23] However, the resolution of the assault case appears to have done little to improve the relationship between Mr. Armitage and Ms. McCann. She remains exceptionally bitter towards Mr. Armitage and his new spouse. The bitterness unfortunately manifests itself in the custody dispute and has, in my view, a very negative impact on the children who have become pawns in the ongoing struggle.

[24] It is significant that the care and control order of June 24, 2003 has brought some peace to the situation. The ongoing dispute is fuelled primarily by Ms. McCann in response to applications by Mr. Armitage for increased contact with his children. It has culminated in conduct by Ms. McCann that can only be described as contemptuous. It has had the unfortunate but perhaps desired effect of preventing increased access to Mr. Armitage.

[25] The Child Advocate did not oppose Mr. Armitage's access application, nor did she indicate any concerns about the relationship of Mr. Armitage and the children. In fact, the concerns of the Child Advocate clearly related to the parental interference of Ms. McCann which resulted in the resignation of the Child Advocate. Her resignation was unusual in the experience of this court, especially considering the seniority and lengthy experience of this particular Child Advocate. It indicated a high level of parental interference with the wishes of the children in this case to the point where the role of the Child Advocate had become superfluous and unnecessary. Normally, in a custody proceeding, the Child Advocate is a valuable neutral advocate on behalf of the children. However, I am left with the clear inference that Ms. McCann is using the children to achieve her own objectives. Indeed, she has used the children to thwart an order of this court.

[26] In the case of *Dhillon* v. *Dhillon,* [2001] Y.J. No. 128 which also dealt with spousal violence, I set out the general principles relating to access at para 13 as follows:

> 1. a child should have as much contact with each parent as is consistent with the best interests of the child;
> 2. the access of a child to a parent is the right of the child;

3. the best interests of the child requires consideration of the condition, means, needs and other circumstances of the child;
4. access may be denied to a parent if it is not in the best interests of the child;
5. the past conduct of a parent may be taken into consideration if it is relevant to the ability of that person to act as a parent of a child;
6. the onus is on the parent seeking access, to establish on a balance of probabilities that access is in the best interests of the child.

I must also consider the sections 16 (8), (9) and (10) of the *Divorce Act*, R.S., 1985, c. 3 (2nd Supp.):

> 16. (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> 16. (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
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> 16. (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[27] I have concluded that Mr. Armitage's assaultive conduct in the past has no bearing on his ability to parent or his relationship with the children. I cannot come to the same conclusion with respect to the impact of his assaultive conduct on Ms. McCann. However, the conduct of Ms. McCann in directly disobeying an order of this court cannot be condoned. It is not the relationship of the parents that is at issue. Rather, it is the best interests of the children that must prevail and I find that an equal sharing of the

children will be most beneficial to them. Thus, F. and Z. will have the maximum contact with both their parents in a parallel parenting regime as follows:

1. Ms. McCann and Mr. Armitage shall have interim joint custody of the children.
2. Ms. McCann will have care and control of the children for the week commencing January 26, 2004 at 9:00 a.m. and Mr. Armitage will have care and control in the following week commencing at 9:00 a.m. February 2, 2004. Care and control will alternate each week thereafter.
3. Communication between Ms. McCann and Mr. Armitage will be by e-mail.
4. The children shall participate in such extracurricular activities as the parents may agree on and the costs of such activities shall be paid by Mr. Armitage. If there is no agreement on extracurricular activities, each parent will support the children separately in those extracurricular activities pursued during the care and control of that parent.
5. Each parent shall have telephone access to the children on Tuesday and Friday night at 7:00 p.m. for thirty minutes in the week when the children are in the care and control of the other parent.
6. Neither Mr. Armitage nor Ms. McCann shall consume alcohol or drugs during their care and control of the children.
7. 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. Telephone communication may be used in case of emergencies.

8. 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. If the parents cannot reach an agreement, either parent may apply to this court for an order.
9. 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.
10. Each parent shall have the children for 1 month during the summer and shall share the children equally during the Christmas holidays and Christmas day, subject only to such other agreements that may be reached by the parties or ordered by this court.
11. Neither parent may remove the children permanently from the Yukon Territory without a court order.

[28] With respect to the application of Ms. McCann for spousal support, there is no doubt a connection between Ms. McCann's financial predicament and the breakdown of the marriage. However, it should also be noted that Ms. McCann is quite capable of being gainfully employed whether in the arts field or some other endeavour. Thus, I see her financial need as being a temporary one. Mr. Armitage's ability to pay is certainly quite limited. I therefore order spousal support in the amount of $250 per month for the limited period of one year to allow Ms. McCann to get back on her feet. Spousal support shall commence on February 1, 2004 and terminate after the final support payment on

January 1, 2005. Ms. McCann shall be responsible for paying her own telephone and fuel expenses.

[29] In ordinary circumstances, I would order Ms. McCann to pay the court costs of Mr. Armitage for this application. However, given Ms. McCann's financial situation, it would simply exacerbate her circumstances and would undoubtedly impact unfavourably on the children. There will be no order for costs.

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VEALE J.