
CANADA / JUDGMENT

A.M.G. v. S.W.G.

2004 BCSC 579

COURT

Supreme Court of British Columbia

DECIDED

30 April 2004

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

A.M.G. v. S.W.G.,

2004 BCSC 579

Date: 20040430

Docket: E56439

Registry: Kelowna

Between:

A.M.G.

Plaintiff

And

S.W.G.

Defendant

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Plaintiff:

M.E. Shaw

Counsel for the Defendant:

B.M. Young

Date and Place of Trial:

April 21, 2004

Kelowna, B.C.

- [1] Both parties have brought applications before me relating to the custody and access of their two children, S.G., having a date of birth of [], 1997 and E.G., having a date of birth of [], 2000.
- [2] The plaintiff's application is for an order setting aside the ex parte order of Master Bishop, dated March 24, 2004, prohibiting her from moving with the two children to a residence which is more than a 15 minute drive from the City of G.[], British Columbia, without further court order.
- [3] Assuming this order is granted, the plaintiff then applies for an interim order that she be entitled to relocate to Penticton with the children and that the order of Brooke J. dated November 25, 2002 granting certain access to the defendant, be varied as to that access.
- [4] The defendant's application is to vary another term of the order of Brooke J. granting the plaintiff interim sole custody of the children until further order of the court, to grant him sole interim custody of the children, or alternatively joint custody with the plaintiff with the primary residence of the children to remain with the plaintiff in G.[], or in the event the plaintiff moves to Penticton, then with him in G.[] with access to the plaintiff.
- [5] The parties married on May 30, 1992 and separated on April 14, 2002. They were divorced effective May 29, 2003.
- [6] The parties practised together as lawyers in the City of G.[], prior to separation. Upon separation the plaintiff took over the law practice on her own and the defendant turned his efforts to earning an income from other sources.
- [7] By order of the court of April 8, 2002 the parties consented to the defendant having liberal and generous access to the children, including a specific schedule.
- [8] By further order of the court on April 26, 2002, again by consent, the parties agreed to permanent joint custody and joint guardianship of the children with their primary residence being with the plaintiff.
- [9] On November 25, 2002, Brooke J. granted the plaintiff interim sole custody of the children until further order of the court with a review of the interim sole custody ordered to be on a date agreed to between the parties in early 2003. He also specified access to the defendant.
- [10] At the same time Brooke J. issued a restraining order against the defendant prohibiting him from entering any residence where the plaintiff resides and from directly or indirectly molesting, annoying, harassing, communicating with or attempting to molest, harass or communicate with the plaintiff, save for certain specific exceptions.

- [11] The parties were thereafter divorced from each other by court order of April 28, 2003, effective 31 days thereafter.
- [12] The last order of the court was the order of Master Bishop of March 24, 2004.
- [13] The status at the present time therefore, by these court orders, as it concerns the children, is that the plaintiff has sole interim custody of them and provides their principal residence, while the parties are joint guardians and the defendant has certain access rights.
- [14] The applicable statute law on these applications is found in the Divorce Act, R.S.C. 1985 c. 3 and the Family Relations Act, R.S.B.C. 1996 c. 128.
- [15] In the Divorce Act the relevant provisions are found in s. 17.
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (a) a support order or any provision thereof on application by either or both former spouses; or
- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
- [16] Provisions of s. 16 are also relevant.
16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).
- (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.
- (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.

[17] In the Family Relations Act the relevant provisions are found in s. 20 and 24(1) as follows.

20 Subject to this Act, if a court has made an order under this Act, except an order under Part 5 or 6, the court may, on application, vary or rescind the order if circumstances have changed since the order was made or last varied.

24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

[18] The leading case authority concerning a change in custody and allowing the relocation of children is the decision of the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In that case McLachlin J. (as she then was) speaking for the majority said this:

49 The law can be summarized as follows:

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?

[19] Applying these factors to the evidence before me I find as follows.

[20] The threshold requirement of demonstrating a material change in the circumstances affecting the children is met by the mother's intended move to Penticton with the children and the consequent disruption to the children's lives and the diminution of their father's contact with them. The defendant had a considerable amount of access and was involved in the lives of his children on almost a daily basis. His existing access will be reduced if the children move to Penticton with their mother.

[21] I must therefore embark on a fresh inquiry into what is in the best interests of the children and that inquiry is to be based on any findings of the judge who made any previous orders and the evidence of any new circumstances.

[22] There are two previous orders in this case on the issue of custody and access. The first order is the consent order of April 28, 2002 for permanent joint custody and guardianship with the primary residence of the children to be with the plaintiff. Being an order by consent there were no findings made by the judge. The second order is that of Brooke J. of November 25, 2002, granting the plaintiff interim sole custody and granting the defendant certain access rights. This order was based upon allegations by the plaintiff that the defendant had assaulted her. The defendant denies this vehemently.

[23] The affidavit evidence indicates the children have primarily resided with the plaintiff since separation, but that the defendant has exercised liberal access to the children. The children's needs appear to have been met through maximum contact with both parents. Both parents appear to have the ability to care for the needs of their children, both emotionally and financially, although in the case of the defendant, financially it is only through the assistance of his present fiancé, since he does not presently make enough

money to even pay child support to the plaintiff, while in the case of the plaintiff, financially it is only if she takes up her new employment in Penticton at \$60,000 per year.

- [24] The plaintiff says that if she is not allowed to take the children with her to Penticton then she will not go herself but will remain in G.[] and seek employment there. The evidence appears to be, however, that there is no viable employment for the plaintiff in G.[] in her qualified field of law, and no identifiable employment otherwise. If the plaintiff is not allowed to move the children with her to Penticton, and remains with the children in G.[], the stage will probably be set for an application by the defendant for a change in custody and principal residence as the plaintiff will not be financially able to look after the children.
- [25] I am not to apply any legal presumption in favour of the custodial parent, which I consider to be the plaintiff in these circumstances, as she provides the primary residence as agreed to between the parties and has sole interim custody at the present time. However, I am obliged to give her views great respect and of course her views are that the children are better off under her care in Penticton than under the defendant's care in G.[]. She is willing to give the defendant access on weekends and to assist in the driving as G.[] is only two hours or so from Penticton.
- [26] The affidavit evidence is entirely conflicting on each party's parental skills and on the best interests of the children, which is the only interest I am to take into account on this application.
- [27] The plaintiff has her supporters and the defendant has his. It is impossible to decide whose evidence to accept on the affidavit evidence alone. I get the real sense, however, that both these parents are trying to be good parents to their children but that the problem appears to be the animosity that has built up between them.
- [28] I do not see any sign that the children do not have a very good relationship with either parent and I therefore believe that contact with both parents should be maximized as much as possible. The children are too young to seek their own views but I do not think that at their ages there will be much disruption to them with a move to Penticton although I do believe that there would be some disruption to them with a change in custody.
- [29] As *Gordon v. Goertz* states I must weigh the importance of the children remaining with their mother in whose custody they have become accustomed in the new location against the continuance of full contact with their father in G.[].
- [30] Weighing the factors as best I can I have concluded that the best interests of the children are to continue to reside with their mother in Penticton. She has provided their primary residence for approximately two years now since separation and she appears now to have a secure job in Penticton that will enable her to provide financially for her children. At the present time the defendant does not appear to have the financial resources on his own to care for his children although that may improve in the future.

- [31] I do believe, however, that it is important at their young ages for these children to have as much access to their father as possible in order to build and reinforce the bond between them.
- [32] I therefore set aside the order of Master Bishop and allow the plaintiff to move the children with her to Penticton for her new employment.
- [33] I also vary the access of the defendant as set out in the order of Brooke J. of November 25, 2002 and order that the defendant shall have weekend access to the children on two weekends out of every three weekends commencing Friday night and ending on Sunday night where it is a two day weekend, and commencing on the night before a three day weekend starts and ending on the last night of the three days. This access will commence with the first weekend after the children move with the plaintiff to Penticton.
- [34] The children will be exchanged between the parties at Osoyoos, British Columbia, which I am advised is approximately the mid point between G.[] and Penticton. I will not specify the time of day when the exchanges should take place as it will take each party some time to get to Osoyoos for the exchange and I am hoping the parties can agree on the timing.
- [35] The defendant will have generous and liberal telephone access to the children as well and again I am hoping that this can be scheduled between the parties as well.
- [36] I am not dealing with holiday periods as no submissions were made to me on these periods except to say that they should be divided equally. I hope the parties can agree without further order.
- [37] The orders are interim only as the plaintiff has sought only an interim order to relocate with the children to Penticton and the defendant has suggested that he may wish to pursue the custody and mobility issues further. While I hope that the parties can live with this result and can agree on the details of access, I will make these orders on an interim basis only, subject to any further court order.
- [38] The parties will bear their own costs.

"J. Truscott, J."

The Honourable Mr. Justice J. Truscott

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