

CANADA / JUDGMENT

Archibald v. Archibald

2002 BCCA 477

COURT

British Columbia Court of Appeal

DECIDED

28 August 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2002 BCCA 477

Citation:

Archibald v. Archibald

Date: 20020828

2002 BCCA 477

Docket:

CA028950

CA029597

CA029759

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

MONICA FAITH ARCHIBALD

APPELLANT

(RESPONDENT BY CROSS-APPEAL)

(PLAINTIFF}

AND:

RANDAL DAVID ARCHIBALD

RESPONDENT

(APPELLANT BY CROSS-APPEAL)

(DEFENDANT)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Madam Justice Levine

C.M. McClughan

Counsel for the Appellant,

Respondent by Cross-Appeal

C. Linde

Counsel for the Respondent,

Appellant by Cross-Appeal

Place and Date of Hearing:

Vancouver, British Columbia

July 19, 2002

Place and Date of Judgment:

Vancouver, British Columbia

August 28, 2002

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Levine³:

Introduction

- [1] These three appeals are brought by the mother of the parties' two children, daughters now almost nine and six years old, from orders concerning their custody and access.

Background of the Litigation

- [2] The parties separated when the mother moved with the children from Ladner to Grand Forks, B.C. in March 1999. The mother obtained an interim order of sole custody in April 1999.
- [3] A three-and-a-half week trial was held in the spring of 2001. The principal issues addressed at the trial were custody, residence and access. The mother testified that she would relocate to the Lower Mainland if the trial judge ordered that the children were to be returned from Grand Forks to live with the father.
- [4] On August 31, 2001, the trial judge issued lengthy reasons for judgment and made interim orders of joint custody and joint guardianship, with the children's place of residence with the father. The trial judge made alternate access orders, depending upon whether the mother relocated to Ladner. The trial judge ordered further that he would remain seized and that "The matter should be brought before me for determination after eight months and before July, 2002." The mother appealed the interim orders (CA028950 - Appeal 1). The father brought a cross-appeal which was subsequently abandoned.
- [5] On February 26, 2002, on application by the father for "directions ...as to the Plaintiff's [mother's] involvement with the children...", the trial judge made further orders concerning access by the mother and communication between the parties and by each of them with the children. The father's application for sole custody was adjourned. The mother appealed these orders (CA029597 - Appeal 2).
- [6] Appeal 1 came before a panel of this Court on March 22, 2002. The Court adjourned the hearing of the appeal pending the trial judge's determination to be made, in accordance with his order of August 31, 2001, between May and July 2002. The appeal was reset for hearing on July 19, 2002.
- [7] The parties appeared before the trial judge on May 8, 2002, for a determination of the issues of custody, guardianship and access. Both parties filed extensive affidavits outlining events that had occurred since August 31, 2001. After discussing with counsel the scope and purpose of the hearing, the trial judge stated that in making interim orders following the trial, he had been anticipating "fine tuning" them, particularly with respect to residency, depending on whether the mother moved to Ladner. He stated, however, that in making final determinations of custody, access and residence, he would consider his findings of fact after the trial and evidence of what had transpired since then contained in the affidavits. In the result, he confirmed the interim orders as final orders, giving the following reasons:

Now, my interim orders made after a trial and based, of course, on my reasons, were to some extent premised on my understanding that Ms. Thate would, if the children were returned to the Lower Mainland as a consequence of a court order, relocate herself in order to be near the children. And my understanding of her intentions was based on her unequivocal statement to that effect at the trial. This, of course, has not happened.

It was my expectation that any further proceedings in this action would focus on arrangements in the best interests of the children, with both parents living in the same area. For example, if that came to pass, as I understood it would, based on the evidence at trial, the potential would be open for some shared or split residency arrangement based on joint custody.

Now, Ms. Thate seeks at this time to, in effect, reopen the whole question of residency, and [sic] circumstances in which the parties reside in communities some 400 miles apart, and Ms. Thate has filed affidavit material going to the capacity of Mr. Archibald to parent these young children. This affidavit material deposes to events subsequent to the relocation of the children from Grand Forks to the Lower Mainland pursuant to my interim orders.

This application brought at this time is more in the nature of an application to vary, and in all of the circumstances, having particular regard for the evidence at trial and my findings of fact and reasons, it is apparent that any such application would call for a determination based on a fully developed evidentiary base. The affidavit material is contradictory. The court, in my view, whether it be myself or another judge, would have considerable difficulty, based on contradictory affidavit evidence, to make a determination of the facts as required to apply the principles that Ms. McClughan, on Ms. Thate's behalf, seeks to have the court apply.

Now, there are reasons for not reopening the trial for the purpose advanced by Ms. Thate at this time. First, the date has been set for the hearing of the appeal from my decision, and Ms. Thate, the plaintiff, plainly wishes to advance the appeal on the scheduled date. It is set, as I understand it, for mid-July 2002.

If I may take the proceedings at trial as an indicator of the extent to which the evidence and positions of the parties would be canvassed, in relation to the relief presently sought by Ms. Thate, it is obvious that a lengthy hearing with viva voce evidence would be required.

I have another concern. Counsel for Ms. Thate has advised that Ms. Thate does not believe that she will receive a fair hearing of her application for the relief sought, based on the affidavit material filed since the trial and reasons for judgment were delivered. This is not a concern I will endorse. However, it is her concern, and it is one which would be fully addressed by leaving the matter, which I characterize as variation due to post-judgment events, to another day before another judge, based on a fully developed evidentiary record.

In conclusion, I will not, in this proceeding, attempt a determination that would amount to a re-examination of parental capacity, based on events that have taken place since the trial and the rendering of my judgment after trial.

Accordingly, my decision with respect to final orders for custody, guardianship and residency are as determined in my interim orders on those issues. This, of course, leaves it open to Ms. Thate, should she choose to do so, to raise the issues out of the affidavit material she has filed in a fresh application, should she seek to do so, and I will not, of course, be seized of the matter. . . .

[8] The mother appealed the orders of May 10, 2002 (CA029759 - Appeal 3).

Grounds for Appeal

[9] The grounds for the mother's appeals focus on both the substantive issues of custody, residence and access (primarily residence), and on the procedural difficulties that arose out of the interim orders made at the conclusion of the trial.

[10] In her factum on Appeal 1, the mother alleges the trial judge made the following errors of judgment:

I. In failing to make a permanent ruling on all of the evidence after 23 days of trial, and by altering the status quo of the Children to accommodate a "determination" of the issues at sometime in the future, on an unknown evidentiary basis.

II. In failing to apply, or give sufficient weight to, the specific criteria enumerated in the Divorce Act 1985, c. 3 (2nd Supp.), the Family Relations Act, R.S.B.C. 1996, c. 128, and the considerations as set out in *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.).

III. In varying the interim order of Master Donaldson in the absence of finding a material change in the lives of the Children, which was not contemplated in the previous order.

IV. By failing to consider the status quo when rendering an interim decision.

V. By giving minimal weight to the Custody and Access Assessment prepared by psychologist, Robert Colby.

VI. By placing too much emphasis on "the maximum contact" principle set out in ss. 16(10) and 17(9) of the Divorce Act, *supra*.

VII. By placing too much weight on the rights and interests of the Husband.

VII. By placing too much weight on the conduct of the Wife and Ms. Sharkey during the parties marriage, and by failing to apply the appropriate weight to the Husband's conduct.

VIII. By failing to consider, and/or apply the appropriate weight to the evidence of the Wife's lay witnesses, and by placing too much weight to the evidence of the Husband's lay witnesses.

[11] In Appeal 2, the mother alleges the trial judge made the following errors in judgment:

I. By pronouncing a permanent access order prior to the date he stated that he would be making his "determination" of the matrimonial issues.

II. By pronouncing a permanent access order without stating the evidentiary basis for his decision.

III. By failing to apply, and/or critically apply, the specific criteria enumerated in the Divorce Act 1985, c. 3 (2nd Supp.) and the Family Relations Act, R.S.B.C. 1996, c. 128 when rendering his access order.

[12] The mother alleges the following errors of judgment in Appeal 3:

I. By pronouncing a permanent custody and residency order of the Children without stating the evidentiary basis for his decision.

II. By failing to apply, the specific criteria enumerated in the Divorce Act 1985, c. 3 (2nd Supp.), the Family Relations Act, R.S.B.C. 1996, c. 128, and the considerations as set out in *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.) when rendering his determination on the issues of custody, residency and the guardianship of the Children.

[13] What I call the substantive grounds for appeal are contained in paragraphs II, V, VI, VII, VII [should be VIII] and VIII [should be IX] of Appeal 1; paragraph III of Appeal 2; and paragraph II of Appeal 3. These paragraphs address the trial judge's consideration of the principles that apply in determining the issues of custody and access and of the evidence relating to those issues.

[14] The appellant's objections to the procedure followed by the trial judge are addressed in the remaining alleged errors in judgment. These are paragraphs I, III and IV of Appeal 1; paragraphs I and II of Appeal 2; and paragraph I of Appeal 3.

Fresh Evidence Motion

[15] At the hearing of the appeal, counsel for the father brought a motion to admit fresh evidence. The fresh evidence consists of affidavits of the father, sworn in response to affidavits filed by the mother on the application that resulted in the access orders made on February 26, 2002. According to counsel, he did not have time to prepare these affidavits before the hearing of that application. He wished to file them on Appeal 2 to provide a complete response to the mother's evidence on the application, referred to in her factum.

[16] Counsel for the mother expressed no real objection to the admission of the fresh evidence, and filed further affidavit evidence on behalf of the mother.

[17] The panel reserved the decision on the application to admit the fresh evidence. I would admit the fresh evidence, although as will be seen, it has not been necessary to consider it in detail.

The "Substantive Grounds" for Appeal

[18] In Appeal 1, the appellant claims, in essence, that the trial judge failed to consider or to give sufficient weight to portions of the evidence that are contrary to his findings of fact. It is not necessary, nor would it be helpful, for me to review in any detail either the evidence or the findings of fact. The trial judge reviewed the evidence at great length and detail in his reasons for judgment. It is evident that he heard and considered all that the witnesses said and reviewed the other evidence presented at trial. He drew conclusions based on his assessment of the credibility and reliability of the parties, the other witnesses and the evidence as a whole. The trial judge also reviewed the legal principles to be applied in determining issues of custody, guardianship, residence and access where the parents live in

different locations, relying on the articulation of those principles in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 and *Nunweiler v. Nunweiler* (2000), 78 B.C.L.R. (3d) (C.A.).

- [19] I find no errors in the trial judge's approach to the issues and the evidence before him. In my view, he remained focussed throughout his reasons for judgment, as required by the Divorce Act and case authority, on the best interests of the children as determined by reference to their condition, means, needs and circumstances and their right to maximum contact with both parents. It was not necessary for him to enumerate and expressly consider in his reasons for judgment all of the factors set out in s. 24 of the Family Relations Act. In my view, he did not overlook or fail to consider any relevant factors.
- [20] The trial judge's focus was clearly stated in his "Summary and Conclusions". He noted (at paras. 202-4) that "both parents have much to offer their children" and both are "loving parents". He found that the father, however, had "not been permitted to take [a] role" in his daughters' lives, because of the mother's "conduct that is contrary to the need of the children to effectively bond with and receive the benefit of his love and care...". The mother was "actively engaged in the care of the children and...has their best interests at heart." He noted, however, that the mother "appears to need [the older daughter's] recognition of her as the best mother in the world [and] this is not a burden that any child should bear." He noted further that the mother's mother had "contributed to the unsatisfactory relationship between [the older daughter] and her father. The younger child is placed at risk that her relationship with her father will be similarly impaired."
- [21] In considering the issues of relocation and disruption to the children's lives, the trial judge noted that the mother's wish, as the custodial parent, to live in Grand Forks, was to be respected unless her move there with the children was improperly motivated, (reflecting the principles of *Gordon* and *Nunweiler*). He commented as follows (at para 208):

In these circumstances, an assessment of the propriety of the relocation must take account of all of the motivating factors. The quest for economic or social advantage must be accorded respect. A desire to restore close physical proximity to a grandparent who has participated in the impairment of the father's relationship with the children cannot be respected, even if the mother and her mother honestly believe the portrait they present of the father. A relocation that places children in an environment so openly hostile to a parent cannot be considered to be properly motivated.

- [22] The mother's counsel objects to the trial judge's characterization of the mother's move to Grand Forks as not "properly motivated", noting that the mother was not motivated to place her children in an environment hostile to the father. I agree that the trial judge may have misspoken, but if there is a legal error, it is not one that overwhelms what I consider to be, overall, a thorough examination of the evidence and appropriate application of the legal principles.

[23] In response to the substantive grounds for appeal, I would adopt and apply the following comments of Prowse J.A. for the Court in a recent judgment, *Scheiber v. Phyll*, 2002 BCCA 409, a case that also involved a child's residence following the relocation of one parent (at paras. 8-10):

Despite the able submissions of counsel for the mother, I am not persuaded that there is any basis for interfering with the order of [the trial judge]. The grounds of appeal are framed in terms of the weight which [the trial judge] gave, or failed to give, to various aspects of the evidence before her. Matters of weight fall primarily within the province of the finder of fact. Further, orders of this kind are highly discretionary and the scope of appellate review with respect to them is narrow.

The standard of review in cases involving the custody of, and access to, children was recently, and forcefully, reiterated by the Supreme Court of Canada in *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014. At para. 13 of that decision, Mr. Justice Bastarache, speaking for the Court, stated that "an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts." In the absence of such an error, it is not the function of an appellate court to reconsider and reweigh the evidence with a view to substituting its opinion of the best interests of the child for that of the trial judge. It is also important to note that these cases are largely fact-driven and that references to other authorities are often of limited assistance, except insofar as they state the basic principles to be applied.

In this case, [the trial judge] reviewed and weighed the evidence and gave detailed reasons for concluding that the best interests of Liam would be served by making the order under appeal. She correctly set forth the relevant principles in *Goertz* and, in my view, no material error has been established in the application of those principles to the evidence before her.

[24] I would dismiss the substantive grounds of appeal.

The Procedural Difficulties

[25] The procedural difficulties identified in the mother's factums arise out of the fact that the orders regarding custody and residence made following the trial were interim, rather than final, orders. Both counsel expressed some frustration with what followed from the interim orders. They said that they did not know why the orders were interim, rather than final; what further evidence would be relevant to the trial judge's final "determination"; and what form the hearing eight months after judgment would take. The mother did not know how to order her affairs, including whether to follow up her intention to move to Ladner, in anticipation of the further hearing.

[26] This confusion is regrettable. The trial judge had reasons for making interim orders. During the hearing on May 8, 2002, he explained:

The situation remained at the conclusion of the trial somewhat dynamic in the sense that the location of Ms. Thate's residence might change...

Anticipating the probability of a relocation of Ms. Thate, I've considered the possibility that there might be a further adjustment in the way of primary residency - not to alter my final order on primary residency, but to make such adjustments as might be warranted by Ms. Thate's move, and frankly, any indication of progress toward resolving the concerns that underlie my order.

- [27] The Court's jurisdiction to make an interim order under s. 16 of the Divorce Act can be found in subsection (2), which contemplates that where an application has been made under subsection (1) for "an order respecting the custody of or the access to...any or all children of the marriage", the court may, on application by either or both spouses or by another person, make "an interim order...pending determination of the application under subsection (1)." Subsection (6) further states that the Court may make an order under s. 16 "for a definite or indefinite period or until the happening of a specified event". It appears the trial judge intended to proceed under subsection (2), but if neither of the parties had applied for a new interim order, his order of August 31, 2001 might also have been framed under subsection (6).
- [28] Having said this, in my view it would have been preferable for the trial judge to have made an order finally determining the custody (and, in this case, the residence) of the children at the end of the lengthy trial, leaving open the question of minor adjustments to access, depending on whether the mother moved to the Lower Mainland or not. The fact that all of these matters were stated to have been decided only on an interim basis created uncertainty for the children and confusion for the parties, as noted above, and could have had the effect of denying a right of appeal. There was in this instance good reason for the trial judge to remain seized, but unfortunately he failed to elaborate, in his judgment of August 31, 2001, on his reasons for not making final orders. In most cases, a final or "permanent" order should be made - "permanent" in the sense that it will remain in effect until varied in accordance with s. 17 of the Act.
- [29] Whether the trial judge was proceeding under subsection 16(2) or (6), in my view he was not required, in the particular circumstances of this case, to find a material change of circumstances before making the adjustments did in May 2002. Nor did he err in failing to consider the status quo at any point of the proceedings: indeed, to the extent the status quo was a relevant factor, he expressly considered it.
- [30] In Appeal 2, the mother claims the trial judge erred in pronouncing a "permanent" access order prior to the date he stated he would be making his "determination". Her objection is that the terms of some of the access orders extended beyond the date of the subsequent hearing.
- [31] There is no legal error. First, no orders relating to custody or access are "permanent"; all are subject to variation on a change of circumstances. Second, the orders made in February 2002 were adjustments and clarifications of the trial judge's earlier orders. All were open for further adjustment, if necessary as a result of the trial judge's "determination".

- [32] In Appeals 2 and 3, the mother claims that the trial judge erred in failing to state the evidentiary basis for his decisions.
- [33] I see no basis for this objection with respect to Appeal 2, and would dismiss this ground of appeal.
- [34] During the course of the hearing on May 8, 2002 (which resulted in the orders appealed from in Appeal 3), the trial judge read the affidavits and, before hearing all of counsel's submissions, commented:

I have read the affidavits.

With respect to the central issue, my view on reading the affidavits, and subject to hearing submissions from counsel, is that the affidavit material doesn't reveal the basis for altering the regimen or regime of residency for the children that I concluded for on an interim basis in my reasons for judgment...

- [35] After hearing submissions, the trial judge concluded that the application was more in the nature of an application to vary his previous orders, and he could not resolve all the conflicts in the affidavits and make a determination of the facts without a full hearing. In light of the pending appeal and the mother's concern over the fairness of the process, he decided not to "attempt a determination that would amount to a re-examination of parental capacity", and confirmed the interim orders as final orders.
- [36] In the circumstances of this particular case as they evolved after August 31, 2001, it seems to me that the trial judge had few practical alternatives but to confirm the interim orders as final orders. Both parties wanted the appeal to proceed, and a full hearing of the evidence on the application before the trial judge might have jeopardized the date of the hearing of the appeal. The specific event about which the trial judge was concerned at the conclusion of the trial, whether the mother would relocate to the Lower Mainland, had not occurred. There was confusion about the principles that applied on the hearing before him.
- [37] The trial judge made it clear that the final orders were based on the evidence he heard and the findings of fact that he made following the trial. He expressed the view that the mother could raise the issues in the affidavits filed subsequent to August 31, 2001 on a fresh application before another judge. Of course, the evidence that is relevant on a subsequent application must be determined by the judge hearing that application. In light of the confusion that followed the trial judge's judgment of August 31, 2001, however, it would be reasonable, it seems to me, to treat the final orders of May 10, 2002 as having been based on the evidence adduced at the trial, and to determine any application to vary on evidence of events that have transpired since then.
- [38] On this basis, I would dismiss this ground of appeal.

Conclusions

[39] I would dismiss all three appeals.

[40] The parties made no submissions on costs. It appears obvious that the costs of these appeals were affected by the procedural difficulties arising from the interim orders. In these circumstances, I am of the view that it would be appropriate for the parties to bear their own costs.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/02/04/2002bccca0477.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/archibald-v-archibald-2002-bcca-477>

Prepared on 28 October 2026 · Esheria