In the Court of Appeal of Alberta

Citation: Spencer v. Spencer, 2005 ABCA 262

Date: 20050726
Docket: 0501-0167-AC
Registry: Calgary

Between:

Shantelle Marie Spencer

Appellant
(Plaintiff)

- and -

Daniel Robert Spencer

Respondent
(Defendant)

The Court:

The Honourable Madam Justice Adelle Fruman
The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Clifton O'Brien

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Mr. Justice C. S. Brooker
Dated the 24th day of June, 2005
Filed on the 5th day of July, 2005
(Docket: 4801-113209)

Memorandum of Judgment
Delivered from the Bench

Paperny J.A. (For the Court):

[1] The issue in this appeal is whether the chambers judge committed a reversible error by granting an order prohibiting the mother, the custodial parent of two children ages eight and four and one-half years, from relocating to Victoria with the children.

[2] The standard of review of custody and access orders calls for a high degree of deference. However, where the chambers judge errs in principle, this court is obliged to intervene.

The Facts:

[3] The mother has been the sole custodial parent since the parties separated in 2000, when the children were three years and six weeks old respectively. Since separation, the father did not exercise access to the children on a regular basis. The chambers judge found that the father did not have much contact with his children. The evidence established that in the year 2002, the father saw the children for 23 hours, in 2003, for 43 hours, and 2004, for 40 hours. The father saw the children once in 2005. In April 2005, after learning that the mother intended to relocate with her fiancé (now husband) and the children to Victoria, the father began exercising access every second weekend.

[4] The chambers judge found that the mother had assumed sole responsibility for the children since separation and likely before that. She is in a committed relationship with her new husband, they are expecting a child in August and wish to move to Victoria, where her husband's family resides and where he has been offered a more attractive job.

[5] Upon learning of the mother's intentions, the father brought an application under section 17(5) of the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp.), to prohibit the mother from relocating with the children and seeking joint custody.

[6] The mother brought a cross-application seeking the court's permission to relocate with the children. During the hearing, the mother acknowledged that if her application to relocate were denied, she would not leave Calgary without the children.

[7] The chambers judge concluded that the proposed move was a material change warranting a reconsideration of the children's best interests.

[8] The chambers judge found that the father was not in a position to assume the parenting responsibility associated with joint custody, as he had yet to establish a track record with the children. However, he also determined that it was not in the children's best interests to be removed from Calgary and ordered that they remain in their mother's sole custody here.

[9] In arriving at his conclusion, the chambers judge referred to the test enunciated in ***Gordon v. Goertz***, [1996] 2 S.C.R. 27, which outlines a two-step process for applications of this nature. Section 17(5) of the *Divorce Act* requires that a judge first find a material change in the child's circumstances. It is only after such a determination that a judge must determine the best interests of the child.

[10] Here the chambers judge failed to properly consider whether there had in fact been a material change, as required under section 17(5) of the *Divorce Act*. His judgment assumes that an application to change the residence of children will always constitute a material change in circumstances.

[11] However, ***Gordon***, *supra*, made clear that relocation on its own is not necessarily sufficient to establish a material change. McLachlin J. (as she then was) clarified that the change must alter the child's needs or the ability of the parents to meet those needs in a fundamental way. Before entering into an inquiry on the merits of an application to vary a custody order, the judge must be satisfied that there is a change that materially affects the child, which was not foreseen or could not reasonably have been contemplated.

[12] In discussing when a move might materially affect the circumstances of the child and the ability of the parent to meet those needs, McLachlin J. noted that where a child lacks a positive relationship with the access parent, a move might not affect the child sufficiently to constitute a material change.

[13] Arguably, those facts existed here, until recently. The father's contact with the children over the last five years has been minimal. While recognizing that were the children to relocate with their mother, the distance between children and access parent would affect the father's ability to exercise access, the chambers judge failed to consider what impact, if any, this move would have on the children.

[14] However, assuming on a proper consideration that a material change did exist, the issue becomes whether the chambers judge committed a reversible error by failing to consider the best interests of the children in the context of the material change so found.

[15] Section 17(5) of the *Divorce Act* requires the court to take into consideration the best interests of the child, as determined by reference to that change. In other words, the analysis of best interests must consider the impact of this change on the children. ***Gordon*** made clear that a child-centred analysis properly includes consideration of the circumstances as they existed prior to the change, but does not stand for the proposition that children's best interests are to be determined by weighing the status quo against the change. Were that so, the status quo would almost always tip the scales.

[16] The factors listed in ***Gordon*** which a judge should consider in determining the best interests

of the children include the existing arrangement and relationships between the custodial parent and children, the existing relationships between the access parent and the children, the effect of the move on the desirability of maximizing contact, the wishes of the children, the custodial parent's reasons for moving only where it is relevant to the parent's ability to meet the children's needs and the effect of the move on the children. But these factors must be weighed in the context of the material change, namely the relocation. In weighing what is in the children's best interests, a court must consider the effect of the move on the children and their relationship with both parents, the custodial parent and the access parent.

[17] Specifically we are reminded in ***Gordon*** at para. 50, of the following:

> 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 interest of the child in all the circumstances, old as well as new?

[18] In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with the children, he or she raises the prospect of being regarded as self interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children," the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.

[19] Once a material change has been found, ***Gordon*** directs the judge to be mindful of the status quo prior to the move, but the inquiry cannot stop there. The relevant inquiry is to the children's best interests, evaluated in the new circumstances as found (here, the effect on the children of the mother's relocation with her new husband and child to Victoria if they are allowed to move) compared to its affect on them if they are not allowed to move. The children's best interests must be assessed in the new circumstances, its impact on them if they stay or if they go: see ***Christmas v. Christmas,*** 2005 ABCA 213.

[20] In this case, the chambers judge weighed the effect on the father if the children moved with their mother to Victoria or remained in their mother's custody in Calgary. In coming to his conclusion, the chambers judge overemphasized the desirability of maximizing contact with the access parent and failed to give respect to the custodial parent's wishes. He did not consider the

impact on the children if they were left in Calgary without their mother, their stepfather and their soon to arrive sibling and the effect on them if left in the care of their father, who the chambers judge found is not able to assume primary or even significant responsibility for their well-being at this time. Here, the father exercised access sporadically over the five-year term. There is nothing to suggest that his relationship with the children will be seriously jeopardized if the access arrangements change to something less regular, but of longer duration.

[21] On the other hand, the trial judge found that the sole care-giver to these children since separation, five years ago, has been their mother and that the move was not motivated by an improper purpose. He stated at F6:15-27:

> The relationship between the mother and these two children is excellent. It has been continuous and it has been positive. It goes beyond saying that the mother has been the person responsible for making the decisions in terms of schooling, health and the like, for these children. And I also consider in that factor the relationship between these two children and [her husband], who has for the last, I think two years or thereabouts, last number of years, been acting in effect as a surrogate father for these children, and they have a good relationship with him, and he with them. So, those things are very positive.

[22] In our view, the children's best interests clearly lie with remaining in the sole custody of their mother and relocating to Victoria. Had the chambers judge conducted an inquiry into the new circumstances, that is whether it is in the children's best interests that they move with their mother or remain in Calgary with their father, this conclusion would have been inevitable, given the facts he found and his decision that it is not in the children's best interests that the father have custody.

[23] Accordingly, the appeal is allowed and the order prohibiting the mother from moving the children to Victoria is set aside. The mother is granted permission to relocate as contemplated with the children, with reasonable access granted to the father to be agreed upon. Failing the parties' agreement on access, that issue will be returned to the Court of Queen's Bench for determination.

[24] Any support issues that arise as a result of this appeal, absent agreement of the parties, are also directed to the Court of Queen's Bench for determination.

Appeal heard on July 19, 2005
Memorandum filed at Calgary, Alberta
this 26th day of July, 2005

Paperny J.A.

(Discussion as to costs)

Fruman J.A. (For the Court):

[25] The appellant advised that she made a formal offer of settlement. Due to the unique circumstances of this case, the difficult situation presented, the very short time frames and considerable cooperation of the parties in expediting this appeal, we are not inclined to order double costs. The appellant will receive one set of costs here and below.

Appeal heard on July 19, 2005
Memorandum filed at Calgary, Alberta
this 26th day of July, 2005

Fruman J.A.

Appearances:

A. A. Fares
for the Appellant

A. C. Schultz
for the Respondent