Court of Queen's Bench of Alberta

Citation: M.N.M. v. J.E.M., 2009 ABQB 607

Date: 20091029
Docket: 4801 119070
Registry: Calgary

Between:

M.N.M.

Applicant

- and -

J.E.M.

Respondent

Editorial Notice: On behalf of the Government of Alberta **identifying information** has been removed from this unofficial electronic version of the judgment.

Reasons for Judgment
of the
Honourable Madam Justice J. Strekaf

---

[1] M.M., (formerly M.N.M.) is applying for an order granting her leave to move with her children E.T.M. ("E.") and C.Z.M. ("Z.") to Victoria and granting J.M. such access to the children as the court may allow. At the outset of the application, I invited the parties to consider whether this was an appropriate case to call viva voce evidence. Both indicated that they wished to proceed to have the matter decided on the basis of the affidavit evidence that had been filed, in respect of which no cross-examinations were conducted.

[2] By way of background, Ms. M.M. and Mr. J.M. were married in February 2000. They have 2 children, E. born 2000 and Z. born 2002. Ms. M.M. and Mr. J.M. separated in June 2003 and were divorced in September 2004. Ms. M.M. married S.M. in July 2005 and they have two children of their own, N. who is now 3 and D. who is almost 2.

[3] E. and Z. have been in the primary care of Ms. M.M. since separation, and Mr. J.M. has exercised regular and substantial access. The parties Divorce Judgment provided that Ms. M.M. and Mr. J.M. would have joint custody of E. and Z. Ms. M.M. was to have the primary residence and day to day care and control of the children and Mr. J.M. was to have reasonable specified access, on Monday and Friday afternoons from 2 to 6 pm, every other weekend from Friday at 2 pm to Sunday at 6 pm and alternate weeks on Wednesday from 2 pm to Friday at 6 pm.

[4] Two previous mobility applications were brought by Ms. M.M. On August 2, 2005, Justice Kenny denied her application to move to Victoria with the children and directed that neither party was at liberty to move outside the Calgary area without the consent of the other party or further court order. The S.M.s moved with the children from Calgary to Chestermere in August 2005, without prior notice to Mr. J.M.

[5] On May 15, 2006, the parties entered into a Consent Order which provided that Mr. J.M. would have access to the children for 40% of the time consisting of every Thursday from 2 pm until Friday morning, on alternate weekends from 2 pm until Monday morning, on alternate weeks from Wednesday at 2 pm until 8 pm, for Christmas day and a block of time up to 4 days in odd numbered years.

[6] On June 30, 2006, Justice McMahon denied Ms. M.M.'s application to move to Montreal with the children.

[7] The S.M.s then moved with the children from Chestermere to Strathmore in July 2006, without prior notice to Mr. J.M., where they have continued to reside. Mr. J.M., who had previously been employed with Canada Post in Calgary for 17 years relocated to Strathmore to be closer to the children in April of 2007. He subsequently quit his job with Canada Post and is now self-employed as a computer technician.

[8] On July 19, 2009, the parties entered into a Consent Order which provided that neither party would relocate the children outside Strathmore without the written consent of the other party or further court order.

[9] Ms. M.M. seeks to move to Victoria with the children because it is expected that her husband’s job with a Montreal company, for whom he has worked on a long distance basis earning approximately $78,000 per annum, will be phased out by September 2010 and there are limited opportunities in Calgary in the post-production aspect of the film industry. He would like to transition into another field as a specialist in UNIX computing systems, which will require retraining and certification as a “Red Hat Certified Engineer”. He has identified some training options in British Columbia. If he pursues retraining, Ms. M.M. will need to return to work. She

estimates that her child care expenses in Strathmore would be $2200 per month whereas if they move to Victoria they would move into a house belonging to Mr. S.M.’s father and his stepmother. His stepmother is a child psychologist with training in early childhood education who would provide childcare at little or no expense to them. She estimates that Mr. S.M. will require 6 to 12 months of additional education and 2 to 3 years to regain his current salary levels. She indicates that they have family support in British Columbia and no family in Alberta.

[10] E. (now 9 years of age) has been diagnosed with Asperger's Syndrome, obsessive compulsive traits and sensory processing issues. E. was assessed by a multidisciplinary team at the Alberta Children's Hospital over a period of 14 months and the family feedback session took place on June 24, 2009. E. has been receiving support services for some time. In Grade 1, his teacher observed some withdrawal from other children and suggested an assessment. E. received play therapy from the Mental Health Clinic in Strathmore for most of that school year. When E. was in Grade 2, he was accepted in the Connections Program which provides children with special needs within the Golden Hills School Division with local access to a developmental pediatrician and a psychiatrist. The goal of the program is to assist in the appropriate diagnosis, treatment and program development so the children will experience improved functioning in their schools, homes and community. E. has continued with the Connections Program and the parties have attended a number of meetings to address E.'s situation, the most recent of which was on October 7, 2009. Some of the individuals that have been involved in his assessment, treatment and the development of his education plan include his school principal, his grade 2, 3 and 4 teachers, two school counselors, Leah Shalanski, Dr Besant, Dr Sade, Dr Rahman (psychiatrist), Dr Veale (developmental pediatrician), Doreen Thom (occupational therapist), Dr Barsky (registered psychologist), Janet Scott (speech-language pathologist), Carol Skelly (education consultant) and various other individuals from the Connections Program.

[11] Z. (now 7 years of age) is a well adjusted child without special needs.

[12] Ms. M.M.'s position is that it would be less disruptive to the children to move to Victoria with her than if they were to remain in Strathmore with their father and have limited contact with her. She argues that the present circumstances are different from those considered by Justice Kenny and that Justice McMahon's decision was made before the Alberta Court of Appeal's decision in *MacPhail v. Karasek*, 2006 ABCA 238, was released. Her position is that both parents agreed that she would be the primary care giver since separation, that there has been no change in circumstances that warrants a change in the children's residence with her and that she should be allowed to move to Victoria with the access arrangements for Mr. J.M. which she has proposed, being a long weekend in November, the Christmas holidays in odd numbered years for one week not including Christmas day and in even numbered years for the full holiday, for spring break and for up to 6 weeks in the summer plus any additional time he may propose subject to reasonable notice.

[13] Ms. M.M. is somewhat critical of Mr. J.M.'s parenting. She expresses concern that he left the children alone on two occasions in the summer of 2009, which he states will not be done again. She says that Mr. J.M. undermines her position with the children and discourages them

from accepting Mr. S.M. and that he would not foster a good relationship with her and their extended family if the children were to reside with him, all of which he denies.

[14] Despite Ms. M.M.'s criticism of Mr. J.M.'s parenting on this application, she stated in an email to him dated May 5, 2009:

> *"I am not opposed to redoing the arrangement to some degree but I would like to get through the evaluation. We really do need to see what will best suit E.'s needs. I have been talking about it lately and have been wondering if he would be happier/calmer with the quiet and structured environment that you can provide. I do feel that E. is at an age where he can offer some input into what he wishes, as long as he does not feel pressure from either one of us. It is because of his age that I am feeling like I can "let go" a bit. I have always acknowledged that you and E. have a very strong bond and you are able to talk with him like I can't"*

[15] Mr. J.M. opposes the children moving to Victoria on the basis that the potential risks associated with the move outweigh the alleged benefits. His position is that both he and Ms. M.M. are fit parents, that the children spend a significant amount of time with him, that it would be particularly disruptive for E. to be moved given the progress that E. has been making and the extensive time spent by multidisciplinary teams at the Alberta Children's Hospital and through the Connections Program on his assessment and developing a treatment plan to address his Asperger's Syndrome.

[16] The leading case with respect to the mobility of children is the Supreme Court of Canada's decision in *Gordon v. Goertz*, [1996] 2 SCR 27, where the Court stated at paragraphs 49 and 50:

> 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?

[17] This decision was applied by the Alberta Court of Appeal in *MacPhail, supra*, in which case the Court reiterated that the test for custody is always the best interests of the child and that, in that case, the real issue was whether the child's primary residence should be with the mother in Okotoks or the father in Medicine Hat. The Court emphasized the need to take into consideration

the effect on the child of the custodial parent becoming an access parent when determining the best interests of the child.

[18] I am satisfied that the threshold requirement of demonstrating a material change in the circumstances affecting E. and Z. has been established where the existing court orders contemplate that the children reside with their mother for 60% of the time and their father for 40% of the time and that could not be practically achieved if the mother was to reside in Victoria and the father was to reside in Strathmore. Ms. M.M. has indicated through the argument filed by her counsel that she is required by her financial circumstances to move to Victoria regardless of whether the children are allowed to move with her. Mr. J.M. has stated that he moved from Calgary to Strathmore to be close to the children at the expense of his Canada Post job and that it is impractical for him to move again as he is now financially stable. As a result, the issue to be determined by the Court on this application is whether it is in the best interests of E. and Z. to move with their mother to Victoria or to remain in Strathmore with their father.

[19] Some of the factors which I have taken into account in assessing the implications of permitting the children to move to Victoria with their mother as opposed to remaining in Strathmore with their father are as follows:

1. I am satisfied that both Ms. M.M. and Mr. J.M. are capable, fit and involved parents who love their children very much. While there appears to be some tension between them, they largely appear to have been able to co-parent reasonably successfully on a shared basis.

2. Ms. M.M. has been a stay at home mom, has had the primary care of the children since separation and they have been with her for more than 60% of the time. The children are very attached to their younger half siblings and it would be a significant adjustment for them to switch to being in the primary care of their father, with only periodic visits with their mother, stepfather and half siblings who would reside in another city.

3. The children have spent a considerable amount of time with their father since separation on a regular basis. If the children move to Victoria, they will be spending significantly less time with him and see him much less frequently. The Consent Order provides that he is to have access 40% of the time and he estimates that he sees them at least for some period of time on over 200 days each year and under Ms. M.M.'s proposal, that would be reduced to 65 to 70 days. It would be a significant adjustment for the children to move to Victoria and have only periodic visits with their father.

4. Neither Mr. S.M. nor Ms. M.M. have any employment lined up in Victoria (beyond Mr. S.M.'s current job which is expected to last less than a year and which could be performed in Strathmore). If the S.M.s relocate, he

will be returning to school for 6 to 12 months and Ms. M.M. will be seeking employment. She has provided no indication of what kind of employment she would seek, how likely it would be for her to obtain employment, what hours she would work or what salary she might expect. While the S.M.s indicate that they will have a place to stay and child care at little or no cost to them, their family (including E. and Z.) will be facing an uncertain financial future with a move to Victoria.

5. If Ms. M.M. returns to work, she will no longer be at home with the children, which will be a change for the children. No direct evidence has been provided by Mr. S.M.'s stepmother (nor has she been made available for cross-examination) with respect to her age, health, availability and willingness to assume full time child care responsibilities for four children.

6. Mr. J.M. is financially stable, having developed a client base as a contractor computer technician since moving to Strathmore. His work schedule enables him to pick the children up after school.

7. If the children move to Victoria, they will be living in a new residence. The only description provided by Ms. M.M. of that residence is that it would be a house belonging to Mr. S.M.'s father. If the children remain with their father in Strathmore, they would continue to live in the home where they have resided with him approximately one third of the time since April 2007.

8. The parties have spent over 14 months meeting with numerous professionals from various disciplines through the Alberta Children's Hospital and the Connections Program to address E.'s issues, which has resulted in E. being diagnosed with Asperger's Syndrome, obsessive compulsive traits and sensory processing issues. If he remains in Strathmore, he has access to professionals who know him at the Alberta Children's Hospital (some of whom are listed above) and he would be able to continue in the Connections Program at the Brentwood Elementary School in Strathmore, which he has attended for 3 years, in a program designed to meet his needs.

9. If E. moves to Victoria, new arrangements will have to be made for him to access support services in British Columbia. While such services exist in Victoria (some of which are described in an attachment to Ms. M.M.'s affidavit), no evidence has been provided with respect to the length of waiting lists for any services not provided through the education system. Ms. M.M. states that no new assessment will be required for E. and that all they need to do is "provide the current report to the school and a plan is

then set up which can include support teachers, speech language pathologists and occupational therapists", however, this fails to recognize the significant resources that have already been expended towards developing treatment and educational plans for E. and the importance of having established contacts with professionals from multiple disciplines who are familiar with E.

10. Ms. M.M.'s assertion that it would be easier to access services because Victoria is smaller is unsubstantiated, particularly where services have already been accessed and arranged in Strathmore. Ms. M.M. indicated that the Willow School (where she proposes to send the children) has been given a strong ranking by the Fraser Institute, that the school would need to assess E. and that their number of special needs students is low so they would have more resources to assign to E.; however, she fails to explain why their number of special needs students is low, or address whether the school has any expertise addressing the needs of children with Asperger's Syndrome.

11. It appears that if the children move to Victoria they will have more opportunities to spend time with their maternal extended family in British Columbia and less opportunities to spend time with their paternal extended family in Alberta. If the children remain in Strathmore they will have less opportunities with their maternal extended family and more opportunities with their paternal extended family.

12. Both children have friends in Strathmore and are involved in community activities there. There would be some adjustment for both children, particularly E., to make new friends and to become involved in new activities in Victoria. There is no reason to believe that would not eventually occur for both children should they move to Victoria.

13. Z.'s educational, health and social needs could be met equally well in Strathmore and in Victoria.

14. Both parents indicated that they would be prepared to facilitate access with the other parent on spring break, during the summer and over the Christmas holiday and would make daily telephone and webcam access readily available.

[20] Taking all of the above circumstances into account, I am of the view that it would be in E. and Z.'s best interests for them to continue to reside in Strathmore with their father, should their mother relocate to Victoria. While I recognize that it will be a significant change for the children to have their mother shift from providing primary care at least 60% of the time to becoming an access parent, remaining together with their father in his home in Strathmore where

they spend regular considerable time will be less disruptive for them, particularly given E.'s special needs, and the many uncertainties associated with the move to Victoria. As a result, I am not prepared to amend the prohibition in the July 19, 2009, Consent Order on either party relocating the children outside of Strathmore without the written consent of the other party or further court order. In the event that Ms. M.M. does move to Victoria, changes will need to be made in the terms of the existing court order which relate to the primary care and control of the children and access arrangements. While no such application was formally brought, Mr. J.M. has indicated that is what he would be seeking if Ms. M.M. does relocate, and this is the comparable scenario that was before the Court on this application. The parties are at liberty to bring this matter back before me for determination in the event that they are unable to agree upon the terms to modify the existing court order upon Ms. M.M. developing concrete plans to relocate to Victoria.

[21] If the parties are unable to agree upon costs, they are at liberty to file written submission in this regard within 30 days of the date of this decision.

Heard on the 13th day of October, 2009.
Dated at the City of Calgary, Alberta this 28 day of October, 2009.

J. Strekaf
J.C.Q.B.A.

Appearances:

Janet Elaine Russell
Scott Hall LLP
for the Applicant

Sonja Adele Lusignan
Campbell O'Hara
for the Respondent