Court of Queen's Bench of Alberta

Citation: C.C.R. v. M.A.V., 2010 ABQB 237

Date: 20100419
Docket: FL01 02216
Registry: Calgary

Between:

C.C.R.

Plaintiff/Respondent

- and -

M.A.V.

Defendant/Applicant

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
Delivered Orally on April 1, 2010

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[1] M.A.V. and C.C.R. cohabited for several months in 2004 and again in 2005. They had one child, M., born 2006. M. has resided with her mother since birth. Mr. V. has exercised regular access since late 2006 or early 2007.

[2] Ms. R. is seeking permission to move with M. to Chilliwack, British Columbia, where she has family and plans to return to school. Mr. V. opposes Ms. R. moving to British Columbia with M. and has cross-applied for day-to-day care and control as he has concerns with Ms. R.'s ability to parent M. appropriately.

[3] By way of background, Mr. V. and Ms. R. ceased cohabiting in October 2005, prior to M.'s birth, when he asked her to move out. In November 2005, Mr. V. drew up an agreement, which they both executed, which provided that Ms. R. would be completely responsible for the child and that she would not seek any form of support from Mr. V. and that he would relinquish all types of parental guardianship. Such an agreement is unenforceable for reasons of public policy. In any event, the parties have not proceeded on this basis.

[4] Mr. V. was present for M.'s birth in 2006. Ms. R. stayed with family in Viking for a month after the birth. When she returned to Calgary, Mr. V. saw M. for a couple of hours two evenings per week until June 2006. Mr. V. had began paying $200/month of child support but when Ms. R. sought an increased amount to $250/month, he broke off all contact and ceased all visits, phone calls and child support. Ms. R. commenced an application for child support in October 2006. On May 16, 2007, the parties consented to an order declaring that Mr. V. was M.'s parent, that his guideline income was $40,200 and that her guideline income was $19,200 and directing that he pay basic child support of $333/month and section 7 expenses of $137.50/month commencing May 1, 2007. Mr. V. continues to pay this amount. Mr. V. resumed regular visits with M. for two evenings per week for a couple of hours in late 2006 (according to him) and early 2007(according to her). These visits continued until February 2009, when he was hired by Corrections Canada and relocated to Drumheller. Since his move, the parties agreed that M. would stay with him in Drumheller for two days every 10 - 14 days, depending upon his schedule. Ms. R. has no vehicle and Mr. V. drives to Calgary for each visit to pickup and drop off M.

[5] Ms. R. works at the Elbow River Casino as a cashier, where she earns $660 net every two weeks. She also receives approximately $200/month from Alberta Works, $275/month in Child Tax Credits and $100 in Universal Child Care, in addition to child support. M. resides with her in a two bedroom apartment subsidized by the Calgary Housing Corporation.

[6] I will deal first with Mr. V.'s application for a parenting order giving him day-to-day care and control of M. A parenting order can be sought by a guardian of a child pursuant to section 32 of the *Family Law Act, S.A. 2003, c. F-4.5*.

[7] For the purposes of this application, I will proceed on the basis that both Ms. R. and Mr. V. should be treated as M.'s guardians. Mr. V. had applied to become M.'s guardian. In the course of the application, counsel advised that Ms. R. agreed to consent to Mr. V.'s application to become M.'s guardian, subject to certain conditions with respect to medical treatment, as Mr. V. is a Jehovah's witness.

[8] Mr. V. has expressed concerns about Ms. R.'s ability to parent, which include the following:

1. There were two occasions of what was characterized as "state intervention", the first being when Ms. R. fell asleep and failed to pick up M. from daycare and the paramedics had to come to wake her up. The

second incident arose after Mr. V. picked up M. in August 2009 and observed that she had permanent marking drawings on her tummy, both above and below her navel, and on her back and bum. He didn't accept Ms. R.'s explanation that M. wanted to look like a care bear. He spoke with an RCMP acquaintance who contacted Children's Services. They sent a team out to Ms. R.'s home on October 13, 2009, who "had significant concerns around the condition of the apartment" and "deemed the condition of the home to be hazardous to a young child and recommend that M. remain with her father until it is clean". They reattended the next afternoon and "found the home to be clean and was sanitized and uncluttered", had "no concerns as of today" and directed that M. could be returned to her mother's care. Their report stated that "Chrystal has been warned about ensuring the cleanliness of the home and, if not, Children's Services could become more intrusive" and indicated that "the assessment of the care of M. by her mother is ongoing to determine what community resources, if any, would be beneficial to the family".

2. M. has some speech and development delays which he says Ms. R. has not been proactive enough about addressing. She is still not toilet trained at four years of age and has limited language.

In October 2009, Kristeena Schultz, the Children's Services Investigator, spoke with Ms. R. about having M. assessed at the Child Development Centre, associated with the Alberta Children's Hospital, to investigate M.'s speech and related delays. Ms. R. took steps to arrange for an assessment but was unable to schedule same before April 2010. She consented to M. being assessed in Drumheller as Mr. V. was able to obtain an earlier assesment date at the Drumheller Health Center in January 2010. A preliminary Speech-Language Assessment was conducted by a Registered Speech Language Pathologist based upon one visit on January 11, 2010. Her report dated March 19, 2010 concluded that M. had severely delayed articulation, that her language skills were "clinically judged to be behind those of her same age peers" and that further testing was required, including a hearing test. Once the assessment was completed, treatment suggestions and goals could be identified, and "follow-up with the Big Country Outreach Program (BCOP) for complete Occupational/Physiotherapy, Sensory and Psychological testing (if necessary) is recommended to determine all of M.'s, strengths, challenges and needs".

While Ms. R. consented to the assessment, she neglected to return a phone call from the intake worker from Alberta Health Services in Drumheller for a month.

3. Ms. R. had not arranged for M. to have a family doctor from the spring of 2008 until late 2009, prior to the intervention by Child Welfare. She now has a family doctor.

4. He questions whether she has been consistent and proactive in addressing M.'s ongoing constipation issues, which is aggravated by her diet.

5. Ms. R. has had financial difficulties, to the extent of requiring assistance from the Calgary Food Bank on approximately six to seven occasions in the past four years.

   While Mr. V. expressed concern about M.'s diet and bought some groceries on one occasion, it must be noted that he has not increased his child support when his salary increased to $52,000 plus benefits when he began to work with Corrections Canada, despite apparent concerns about Ms. R.'s financial circumstances and their impact on M.

6. Ms. R. shows some signs of depression.

[9] Mr. V.'s position is that it would be in M.'s best interests to move to Drumheller and live with him. He is obviously a very caring father. His face lights up when he talks about his daughter and describes the activities that they do together. Ms. R. acknowledges that he is a good father.

[10] Mr. V. works shifts which are currently nine hours one day (6:45 a.m.- 15:45 p.m.), then 16 hours (6:45 a.m. - 10:45 p.m.) and then nine hours, followed by three days off, for an average of 40 hours per week. He expects to be shifting to 12 hour shifts shortly. If M. came to live with him, he has arranged for her to be cared for by a work colleague’s wife, who is at home with her two children and who is known to M. This would presumably necessitate M. staying overnight at someone else's home or Mr. V. arranging for overnight care in his home when he was working nights.

[11] Ms. R.'s position is that M. has resided with her since birth and should continue to do so. She states that she left it open for Mr. V. to see M. when he wanted and that he did not seek greater access. She acknowledges that her place was a mess when Child Welfare intervened but she cleaned it up and said that it would not happen again. She indicated that the Child Welfare worker indicated that the state of her place might suggest depression and she said she had spoken with her doctor and was having some tests done. She says that the markings on M. were put on by her when M. went through a care bear phase. She denies that they were lower than her tummy. On cross examination, she agreed that the Child Welfare visit had benefited M. and referred to it as a "wakeup call" with respect to M.'s speech delay. She was in the process of arranging for an assessment in April at the Child Development Centre at the Alberta Children's Hospital in Calgary but consented to the earlier assessment in Drumheller that Mr. V. was able to

arrange. She says that she has tried a variety of treatments for M.'s constipation and that she is working with M. on potty training.

[12] The test on an application for a parenting order is what is in the best interests of the child. Sections 18(1) and 18(2) of the *Family Law Act* provide:

> (1) In all proceedings under this Part, the court shall take into consideration only the best interests of the child.
>
> (2) (2) In determining what is in the best interests of a child, the court shall
>
> (a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and
>
> (b) consider all the child's needs and circumstances, including
>
> (i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,
>
> (ii) the history of care for the child,
>
> (iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,
>
> (iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,
>
> (v) any plans proposed for the child's care and upbringing,
>
> (vi) any family violence, including its impact on
>
> (A) the safety of the child and other family and household members,
>
> (B) the child's general well-being,
>
> (C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and

(D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,

(vii) the nature, strength and stability of the relationship

(A) between the child and each person residing in the child's household and any other significant person in the child's life, and

(B) between the child and each person in respect of whom an order under this Part would apply,

(viii) the ability and willingness of each person in respect of whom an order under this Part would apply

(A) to care for and meet the needs of the child, and

(B) to communicate and co-operate on issues affecting the child,

(ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,

(x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and

(xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.

[13] In determining what is in M.'s best interests, I have taken the following considerations into account:

1. Both parents appear to love and care for their daughter very much. There is no evidence that M. is being subjected to any physical, psychological or emotional abuse by either parent. I accept Ms. R.'s explanation that the markings on M. related to making her look like a care bear.

2. Both parents acknowledge that M. has issues with constipation and both indicated they have sought advice as to how it should be addressed. It does not appear that they were both following the same treatment approach at the same time. As in any case where a child spends time in different households, particularly where there are any diet and health issues, it is important for them to consult with each other, agree on how those issues should be addressed and do so in a consistent fashion.

3. M. has some identified delays, the extent of which have yet to be fully determined. It is in her best interests that testing and treatment be pursued aggressively by both parents, either in Drumheller, or through the Child Development Centre at the Children's Hospital, or through both in cooperation.

   It is to his credit that Mr. V. has diligently arranged for an assessment of M. in Drumheller. This was pursued by him at the same time as it was being pursued by Ms. R. with the Child Development Centre following the Child Welfare intervention. To her credit, Ms. R. cooperated with M. being assessed in Drumheller where an earlier appointment could be arranged.

4. The Child Welfare report describing Ms. R.'s home as "hazardous to a young child" in October 2009 is of concern. However, Ms. R. cleaned up the house to their satisfaction and stated that the condition of the place would not happen again. I accept her explanation that the messy condition of M.'s room when Mr. V. was picking up M. was because she was doing laundry. However, should cleanliness continue to be an issue, that will need to be addressed.

5. M. is too young for it to be appropriate to determine if she can express meaningful preferences as to where she would like to reside. There is no indication that she is unhappy spending time with either parent.

6. Both parents indicated a willingness to facilitate access with the other parent.

[14] While Mr. V. has raised some legitimate concerns in respect of Ms. R.'s parenting, they are not sufficient, to justify finding at the present time that it would be in M.'s best interests to remove her from her mother's primary care in Calgary. M. has lived with her mother since birth and while she has had regular access with her father, that has been relatively limited, and he has not pursued greater contact or more extended access with M. A move to Drumheller and removal from her mother's primary care would be very disruptive for M. at this stage of her life, particularly in view of Mr. V.'s shift work.

[15] As a result, I am dismissing Mr. V.'s application for primary care of M. at the present time. That said, I did not view Mr. V.'s application as frivolous and he is certainly at liberty to reapply should circumstances change and further concerns develop.

[16] I will now turn to Ms. R.'s application for permission to move with M. to Chilliwack, British Columbia. Permission is required as an order granted in this action on October 15, 2009 provided that she would not remove M. from Calgary without further court order.

[17] The parties agree that the test to be applied by the court on a mobility application where one parent is seeking to move with the child is whether the move is in the best interests of the child. The parties do not agree on how that test should be formulated. Ms. R. argues that the test to be applied is that outlined by the Supreme Court of Canada in the leading case of *Gordon v. Goertz*, [1996] 2 SCR 27 in the context of an application by the custodial parent in a divorce action to move to Australia. The Court stated at paragraphs 49 and 50:

> 49 The law can be summarized as follows:
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> 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.
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> 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.
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> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
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> 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?

[18] This decision was applied by the Alberta Court of Appeal in *McPhail v. Karasek*, 2006 ABCA 238 409 A.R. 170, 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.

[19] Mr. V. argues that M.'s best interest should be determined by applying the considerations set out in section 18 of the *Family Law Act*, referred to above. In my view, both tests provide some guidance into the criteria in particular cases that could be taken into account to determine the best interests of the child on a mobility application, which is the ultimate test.

[20] Ms. R. has not indicated to the Court whether it would be her intention to move to Chilliwack without M., should she not be granted permission to relocate with M. In any event, evidence on this point would not assist the Court: *Spencer v. Spencer*, 2005 ABCA 262, 371 A,R. 78 at para. 18. As the Court would not be granting an order forcing Ms. R. to continue to reside in Calgary, the issue to be determined by the Court on this application is whether it would be in the best interests of M. to move to Chilliwack with her mother or to move to Drumheller and live with her father. In the event permission to move with M. was not granted to Ms. R., she would be at liberty to decide to elect to remain in Calgary with M.

[21] Some of the factors which I have taken into account in assessing this difficult decision are as follows:

1. As indicated above, I am satisfied that both Ms. R. and Mr. V. are capable parents who love M. very much.

2. It would be a big change for M. to move to Chilliwack as she has resided in Calgary all her life. Ms. R.'s plans would also involve a second move as Ms. R. plans to move in with her mother and stepfather for a short period of time, then work and move to her own place with M. (and possibly her sister) once she gets on her feet financially.

3. M. is close to her father, who she sees regularly and it would be a significant adjustment to have only periodic visits with her father.

4. It would be a big change for M. to move to Drumheller to live with her father and be cared for by his work colleague’s wife while he was at work, which includes shift work.

5. M. has lived with her mother since birth and it would be a very significant adjustment to have only periodic visits with her mother if she was to reside in Drumheller and her mother was to reside in Chilliwack.

6. Mr. V. has a comfortable home in Drumheller that is familiar to M.

7. Ms. R.'s plan if she was to move to Chilliwack would be to go back to school on a four year program. As a result, M. would be in day care, or in the care of Ms. R.'s mother while M. was at work or school.

8. M. has some speech and other developmental delays that are in the process of being assessed. A preliminary speech/language assessment at the Drumheller Health Centre was conducted in January 2010 and the report made available in March as a result of steps taken by Mr. V. in November. A follow-up appointment is expected for April and an assessment of M. at the Child Development Centre in also being arranged. If M. was to move to British Columbia, new arrangements would have to be made for her to access diagnostic and treatment services there. There was no evidence provided with respect to the length of waiting lists or availability for such services. The importance of early intervention and treatment cannot be overstated.

10. Both parents indicated that they would be prepared to facilitate generous holiday access with the other parent and make regular telephone access available.

11. Mr. V. identified some concerns with Ms. R.'s parenting. While these were not sufficient at this time for me to find that it would be in M.'s best interest to switch primary care and control, they are not specious concerns and they represent issues that Mr. V. will no doubt be monitoring. In the event that cleanliness of Ms. R.'s home continues to be a serious problem, or if further Child Welfare involvement became necessary, or if she failed to proactively participate in any diagnostic or treatment program developed to address M.'s speech/language and related issues, Mr. V. would be in a position to take appropriate steps. However, if Ms. R. relocates to Chilliwack with M., this oversight by Mr. V. will not be possible.

[22] Taking all of the above circumstances into account, I am of the view that it would be in M.'s best interest to relocate to Drumheller to live with her father, should her mother elect to relocate to Chilliwack. As a result, I am not prepared to grant Ms. R. permission to move to Chilliwack with M.

[23] I note that the restriction contained in paragraph 2 of Justice Graesser's order prohibited Ms. R. from removing M. from the City of Calgary without further court order. That clause is likely unnecessarily restrictive as it would prevent Ms. R. from taking M. on a visit to British Columbia or even to Viking to visit her family there, even with Mr. V.'s consent. It would even prevent Ms. R. from taking M. to visit her father in Drumheller. It should be modified, either by agreement of the parties or on application.

[24] M. is obviously a very special little girl who has two parents who care a great deal about her. I encourage both parents to communicate better and work together to address whatever speech/language or other issues that M. may have. If they chose not to do so, (even where the parents disagree and convince themselves that their approach is best) M. is the one who will suffer. To the extent that Ms. R. has stated that she is prepared to give Mr. V. further access to see M. when he wants, Mr. V. may wish to seek some additional parenting time with M., beyond that which he currently enjoys, should Ms. R. and M. remain in Calgary.

[25] Each party shall bear their own costs.

Heard on the 25th day of March, 2010.
Dated at the City of Calgary, Alberta this 19th day of April, 2010.

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

Appearances:

Sonja Lusignan
Campbell O'Hara
for the Plaintiff/Respondent

Danilo Aburto
for the Defendant/Applicant