Date: 19990212
Docket: 6101-02601

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

THE COURT:

THE HONOURABLE MR JUSTICE HOWARD IRVING

BETWEEN:

KERRY ANNE GRADY, also known as Kerry Anne King

Petitioner (Applicant)

- and -

SEAN PATRICK GRADY

Respondent

REASONS FOR DECISION OF THE HONOURABLE MR. JUSTICE IRVING

COUNSEL:

Ms. K.R. Peterson, Q.C.
For the Petitioner (Applicant)

Ms. L.K. Austin
For the Respondent

REASONS FOR DECISION OF THE HONOURABLE MR. JUSTICE IRVING

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[1] The Respondent (father) applies to vary the terms regarding day to day care, and of access to the eight year old son of the parties.

BACKGROUND

[2] The parties divorced on August 28, 1995, and the Corollary Relief Order dated that day provided, in part, as follows:

> "1. The Petitioner and the Respondent shall have joint custody of the child of the marriage, namely Michael James Grady, born April 18, 1991, and the child shall reside in the day-to-day care and control of the Petitioner.
>
> 2. The Respondent shall have reasonable access to the child of the marriage upon reasonable notice to the Petitioner.

[3] The Petitioner (mother) contemplated remarriage to a person living in Louisiana, U.S.A. and sought the Court's permission to relocate there with her son. Her application came before Schuler, J., who heard ***viva voce*** evidence and argument for three days in May 1998, and gave Reasons for Judgment on July 2, 1998, ***inter alia***, as follows:

> "[1] This is a case about where seven-year-old Michael Grady should live. He was born, and has always lived, in Yellowknife. Since his parents separated in 1993, he has lived with his mother, Ms. King. She now plans to marry a man she first met on the Internet and to live with him in Louisiana. The question is whether Michael should go with her.
>
> [2] Counsel agree that Ms. King's proposed move is a material change in the circumstances of the child which satisfies the threshold requirement of the leading case of ***Gordon v. Goertz***, [1996] 5 W.W.R. 457 (S.C.C.). The inquiry on this trial is therefore what is in the best interests of Michael.
>
> [3] I am called upon to decide which of three options should prevail, those being:

1. that Michael remain in his mother's day to day care with no restriction on his place of residence;

2. that Michael remain in his mother's day to day care conditional upon her continuing to reside in Yellowknife;

3. that Michael is placed in the day to day care of his father, Mr. Grady in Yellowknife.

> [4] I have found this case very difficult to decide. Both parents clearly love and are concerned about Michael. As I said at the close of the trial, I recognize that any decision I render will make one of the parents very unhappy. But my duty in law is clear: it is to do what is in the best interests of the child, not what is fair to the parents: ***R. v. R***. (1983), 34 R.F.L. (2d) 277 (Alta. C.A.)."

[4] Schuler, J. then considered all the evidence adduced, including the desirability of maximizing contact between the child and both parents, and the likely disruption to the child from any change in custody or to removal from family, schools, and the community he has come to know, and concluded:

> "[86] Having considered all of the above, and having given much anxious thought to this matter, I have come to the conclusion that Michael should remain in Yellowknife.
>
> [87] I recognize that my decision will be very disappointing to Ms. King and that she now has her own very difficult decision to make.
>
> [88] The order for joint custody will remain in place. If Ms. King remains in Yellowknife, Michael will remain in her day to day care. Counsel may speak to the matter of increased access for Mr. Grady.
>
> [89] If Ms. King moves to Louisiana, Michael will be in the day to day care of Mr. Grady. Although I understand Mr. Grady's concern about access being exercised in Louisiana by Ms. King, I would not be inclined to restrict her access to Canada but I will hear counsel on that point if they wish to address it.
>
> [90] Counsel are free to submit a consent order for access and child support once Ms. King's decision is known. Otherwise, they may arrange to speak to the matter before me in chambers."

[5] Thereafter the mother decided against remarriage, or any change of residence from Yellowknife, and excepting for a short period when she visited Louisiana, has continued providing the day to day care of her son.

THE RESPONDENT'S APPLICATION

[6] The father seeks a change to day to day care, and of access to his son, by being given his day to day care for alternate two week periods, or some such arrangement. The mother objects to such a change, and asserts that no material change in the circumstances was advanced in support of the change sought.

[7] In argument, the father's counsel submits that Schuler, J. anticipated this application, in her Reasons for Judgment, and obviated any requirement for such a material change when she stated:

> "The order for joint custody will remain in place. If Ms. King remains in Yellowknife, Michael will remain in her day to day care. Counsel may speak to the matter of increased access for Mr. Grady." [Para. 88]

and

> "Counsel are free to submit a consent order for access and child support once Ms. King's decision is known. Otherwise, they may arrange to speak to the matter before me in chambers." [Para. 90].

[8] However, it is clear that the father's request that the son live for two weeks alternatively with each parent was considered by Schuler, J. (para. 28 of her Reasons) where she commented:

> "… When Mr. Grady commenced a new daytime position as an Admissions Discharge Officer with YCC in the spring of 1997, before there was any discussion about Ms. King moving away, he suggested to Ms. King that Michael live with him for two weeks at a time. This was not acceptable to her and she suggested instead that Michael be with his father on alternate weekends. She testified that she felt the leap from one overnight visit a week to two weeks overnight straight would be too much and that Mr. Grady should try weekend visits first. Mr. Grady preferred the weekly visiting schedule already in place if he could not have the two weeks, so he did not agree to her suggestion. I think the positions of both parties are understandable in that regard. What Mr. Grady was seeking would amount to a new regime of day to day care, not simply access. The alternate weekends proposed by Ms. King would mean a longer gap between the child's visit with Mr. Grady than the regime

> already in place. The fact remains that Mr. Grady sought more time with the child."

[9] The mother has also pointed out that it is open to the father to obtain greater access, particularly during the spring and summer school breaks. These have not been sought by him, although the mother clearly invites the father to consider increasing his access during such times.

[10] Section 17(5) of the ***Divorce Act*** requires some material change since the making of the custody order in the condition, means, needs or other circumstances of the child before the Court makes any variation order. Here no such material change has occurred since Schuler, J.'s order of July 2, 1998, and the father's application must fail, and it is unnecessary for me to consider whether such an extensive variation in custody is appropriate for this 8 year old child.

[11] I am grateful for the candour of both counsel in their excellent submissions. I recognize that there is still a substantial degree of bitterness by the parties towards each other. However, the mother's flexibility about increased access for the father bodes well for some reasonable accommodation on this issue.

APPEAL HEARD on JANUARY 22, 1999

MEMORANDUM FILED at YELLOWKNIFE, NORTHWEST TERRITORIES
this day of FEBRUARY, 1999

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IRVING J.A.