Ivens v. Ivens, 2008 NWTSC 18 Date: 2008 03 10
DOCKET: S-1-DV200600003747

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTINA GENEVIEVE IVENS

Petitioner

-and-

SEAN DAVID IVENS

Respondent

Application by the Petitioner for an order for interim joint custody, day-to-day care and relocation of two children.

Heard at Yellowknife, NT: February 18th & 19th, 2008

Reasons filed: March 10, 2008

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A.SCHULER

Counsel for the Petitioner: Katherine Peterson, Q.C.
Counsel for the Respondent: Anne Ferguson Switzer

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REASONS FOR JUDGMENT

[1] This is an application by the Petitioner for an order that she and the Respondent have interim joint custody of their two children, that she have the day to day care of the children and that she be permitted to relocate them from Yellowknife to Ottawa. The Respondent opposes the move and seeks to have the children remain in Yellowknife.

[2] No custody order has been made to date. There is a consent order dated February 23, 2007, which includes a provision that the Respondent shall have access to the children on weekends provided that the time for access exercised by him is for the purpose of him providing care for the children. Although the order does not specify who is to have the care of the children during the week, that care has been provided by the Petitioner.

[3] In his counter-petition the Respondent seeks joint custody of the children and that he have the day to day care of them. He has not, however, filed a motion seeking their day to day care on an interim basis.

[4] The main issue on this application is, therefore, the "mobility" issue, which I think is more appropriately referred to as the "relocation" issue, i.e. should the

Petitioner be permitted to change the residence of the children to Ottawa. This is invariably a difficult issue, potentially bringing into conflict the legislated principle that a child should have as much contact with each parent as is consistent with the best interests of the child (s. 16(10) *Divorce Act*) and the understandable wish of a parent to move on with his or her life after a marriage breakdown.

[5] In this case, the children are a daughter, now 11 years old, and a son, now 7 years old. The family has lived in Yellowknife since the birth of the children. The children do not have any special needs that cannot be accommodated in Yellowknife.

[6] Although this is an interim application, the Petitioner and Respondent each testified. There were no other witnesses. There was no independent evidence as to the wishes of the children or the effect on them of the proposed move.

[7] The parties were married in 1994 and shortly thereafter moved to Yellowknife. The parties did not agree in their testimony as to the amount of time each spent caring for the children prior to their separation in 2006. While the Respondent testified that he shared in their care to the same extent as the Petitioner, from the evidence it appears to me that the Petitioner was largely responsible for their daytime care; for example, after their son was born in 2000, she took a year of maternity leave and when he was 3 years old, two years of care and nurturing leave from her employment. The Respondent was very involved in a business that he had developed and he traveled for that purpose. I accept his evidence that he remained involved in the care of the children, but I do not accept that it was to the same extent as the Petitioner.

[8] Both parties agree that the Respondent did not spend very much time at home in the months leading up to the separation in the first week of June of 2006. The Respondent testified that he knew that the marriage was over and things were not good between him and the Petitioner and so in December 2005 or January 2006 he put his efforts into work and friends and avoided being at home.

[9] On separation, the Respondent moved out of the family home and into a condominium he had purchased. He also took several trips, to which I will refer further on. He spent a week in Edmonton with the children during the summer months and took care of them for a couple of days at the end of August when the Petitioner had to work. He also had them in his care for a couple of weekends in September 2006 and for supper occasionally. In October 2006 he told the Petitioner that he wanted to have

the care of the children fifty percent of the time. She did not agree and they settled for the time being on the children staying with him for one week a month.

[10] Neither party was particularly happy with the one week a month arrangement. The Petitioner sought to change it to weekends after what she described as a particularly bad week, when the Respondent left the children with a mutual babysitter for a couple of days while he ran in a marathon out of town and then during the week he was with them forgot to take them to a swimming lesson. They eventually agreed on the February 23, 2007 consent order for weekends only, although the Respondent says he was pressured to do this because the Petitioner would not extend a deadline for the filing of financial information unless he did, an explanation I find puzzling since he could have applied to the Court for an extension of time. The parties have also been able to agree on an equal split of holidays such as Christmas, spring break and summer.

[11] Both parties prepared charts or lists of the weekend access exercised by the Respondent during 2007. These documents are not consistent. The Petitioner takes the position that the Respondent did not exercise access every weekend and that he increased the access weekends after she told him she wanted to move to Ottawa. While the charts do indicate that the Respondent did not exercise access every weekend, there were explanations for some such occasions, such as his letting the Petitioner have the children when it was her birthday and on Mother's Day. I do not, however, see any great difference between the amount of access exercised before as opposed to after the Petitioner indicated that she wishes to move.

[12] The Respondent has also sought access during the week. The Petitioner testified that she has not permitted that. She feels that it is not appropriate because it would make the children tired and disrupt their routine, which at this time involves swimming on two nights and homework on two others.

[13] The Respondent testified that he feels the access as it is does not work well and does not allow him to establish much of a routine for the children when they are with him. He would like to see a schedule whereby they would alternate two weeks with each parent. He would also like some flexibility in being able to change the scheduled weeks so as to accommodate travel commitments. As indicated above, however, he has not brought an application for access to be ordered in those terms.

[14] The Petitioner does not allege that the Respondent is not a capable parent but does say that he does not always put the children's needs before his own plans. She gave a number of examples, some before and some after separation. Some of these appeared to me to be minor in nature or misunderstandings, such as the recent incident when the daughter did not have her inhaler after returning from a weekend with the Respondent. Some emphasis was put on the period of approximately three months immediately after the separation when the Respondent spent time on personal trips to Las Vegas, Costa Rica and Hungary, without always keeping the Petitioner advised of his whereabouts or how he could be contacted. He did not spend a lot of time with the children. The Respondent says that this was his way of dealing with the stress of the separation, pressures at work and moving out of the family home and that the Petitioner was not prepared to allow him much time with the children in any event. He effectively conceded that during that time he put his own needs first. Notwithstanding that, his involvement with the children has been consistent since then even if he has not exercised access every weekend that he could have. He appears to be trying to work out a schedule that will include work and personal travel and time with the children.

[15] In my view, none of the events that are relied on by the Petitioner as indicating that the Respondent does not put the children first are so serious or significant as to cast doubt on whether their relationship with him is one that should be encouraged and preserved. In any event, the issue is not whether he is a deserving parent; the issue is what is in the children's best interests.

[16] The Respondent considers the Petitioner to be a good mother. In his view, the Petitioner and he have very different parenting styles and the children would be adversely affected if either parent was not with them much of the time.

[17] The Petitioner has decided she wishes to move to Ottawa with the children. She gave three reasons for this: her parents, her support system and the benefits Ottawa offers.

[18] The Petitioner's parents live in Newfoundland. Her father, who is in his late 60's, suffers from a form of dementia. Her mother is his care giver. Since the parties' daughter was born in 1996, the Petitioner's parents have traveled to Yellowknife more than 20 times, sometimes staying for months at a time. They have a close relationship with the children. However, the Petitioner's mother has told her that they will not

come any more as the lengthy trip from Newfoundland is difficult and confusing for the Petitioner's father and stressful for her mother.

[19] The Petitioner plans to have her parents move in with her in Ottawa, where there are better care facilities for her father and there is a direct flight to and from Newfoundland. She will also help with her father and her mother will help her with the children. Her parents will maintain their home in Newfoundland and will likely spend their summers there.

[20] The Petitioner also testified that she and the children have lost the support system they had in Yellowknife as the Respondent is often away and many friends have moved away, particularly her sister, who had lived in the city for approximately one and a half years. She also testified that many of the friends she and the Respondent had during the marriage were his business associates whom she no longer sees. She has some cousins in Ottawa and there are people there whom she knew in Yellowknife.

[21] Her inquiries about Ottawa lead the Petitioner to believe that there are more school choices for the children, better programs and more activities. The cost of living is less than in Yellowknife. She has been offered a job in Ottawa with her current government employer to begin when this school year ends. There is no evidence that the job offered differs in any significant way from the job she has in Yellowknife. She has also made inquiries about medical care and has an idea of the area of Ottawa she would like to live in.

[22] The Petitioner denies that the proposed move has anything to do with her relationship with a man she has been dating for ten months who is originally from Ottawa. She testified that he has a good job in Yellowknife and she does not know whether he will move to Ottawa.

[23] When asked by her counsel what she would do in the event of an order that the children remain in Yellowknife, the Petitioner indicated that she does not know. She testified that things cannot go on as they are now and that something has to change.

[24] The Respondent testified that if the Petitioner moves without the children he will care for them on a full time basis and purchase a suitable home. Although there seems to have been some discussion between the parties about the Respondent's preference

that if there is to be a move, it be to Edmonton, he testified that he views this as a last resort. His primary position is that the children should remain in Yellowknife, which he views as their home. He conceded that he spends a lot of time in Edmonton. He has a relationship with a woman who lives there. Her son and the parties' children have met and have spent time together. He says that there are no plans for either of them to move and that this is and will remain a long distance relationship.

[25] In a dispute involving a change in a child's residence, the Court must make its decision in accordance with the best interests of the child by means of the approach set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. Although that case involved a variation application, subsequent decisions have ruled that its direction as to an inquiry into the best interests of the child also applies when the relocation issue arises in an initial or interim custody determination; for example, *A.S. v. T.S.*, [2007] N.B.J. No. 439 (N.B.Q.B.).

[26] As directed in *Gordon v. Goertz*, there is no legal presumption in favour of the custodial (legal or de facto) parent, although that parent's views are entitled to great respect. The focus is on the best interests of the child, not the interests or rights of the parents. More particularly, the judge hearing the application must consider the following factors:

> (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.

[27] Ultimately, as set out in paragraph 50 of *Gordon v. Goertz*, 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?

[28] A point that must not be lost sight of is that this is an interim application so the Court is considering what the best interests of the children are pending a final hearing. The Respondent argues that the decision to allow relocation should not be made on an interim application. While neither counsel referred to case authorities directly on that point, I find guidance in *Datars v. Graham*, [2007] O.J. No. 3179 (Ont. Sup. Ct. Jus.), where the Court, after reviewing a number of cases, said:

> ... the general reluctance of the court to effect fundamental changes in a child's lifestyle on interim motions has resulted in a slightly more restrictive approach to interim mobility cases, one that recognizes the short-term nature of interim orders and the summary nature of interim motions. As well, since the decision on an interim motion in a mobility case will often strongly influence the final outcome, particularly where relocation is permitted, caution is called for, especially since even more disruption may be caused in a child's life if an interim order permitting the move is later reversed after trial ...

[29] The reference in the portion quoted above to the summary nature of interim motions arises from what the Court in *Datars v. Graham* called "the typically conflicting and incomplete affidavit evidence that is often available to the court on interim motions". In this case, however, the Petitioner and the Respondent both testified and were cross-examined, so I have the advantage of their evidence having been tested, although no other evidence was presented. While there were some inconsistencies within the evidence of each of the parties, I do not find they significantly affect either party's credibility.

[30] Other helpful considerations for deciding the issue of relocation on an interim basis are listed by Marshman J. in *Plumley v. Plumley*, [1999] O.J. No. 3234 (Ont. Sup. Ct. Jus.):

> 1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.
>
> 2. There can be compelling circumstances which might dictate that a justice ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests of the children might dictate that they commence school at a new location.
>
> 3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at trial.

[31] The Petitioner submits that she is and has always been the primary caregiver for the children. I accept that the evidence shows this to be the case. Although I also accept that the Respondent wishes to become more involved in the care of the children, I find that to date he has largely acquiesced in the Petitioner taking on the role of primary care giver or simply assumed that she would do so. For example, he testified that when he was traveling after the separation, the parties' "arrangement" was that the Petitioner would have the care of the children until his condominium was adequately furnished for them. I do not see how this could be an arrangement in the sense of an agreement between them when for some of the time the Petitioner was not even aware of his whereabouts and he was not in regular contact with her.

[32] It is also clear from the evidence that the Petitioner has been more involved in and knowledgeable about the children's medical issues. It would likely be a major change and disruption for them were they not to be in her care on a full or part-time basis.

[33] The Petitioner's work also does not involve much travel, giving her a more fixed schedule. The Respondent continues to travel, and require some flexibility for that purpose, as reflected in his evidence that he would want flexibility in the split custody regime that he would like to have in place in the future.

[34] On the other hand, the children now see the Respondent on a regular basis, both in Yellowknife and on short and longer trips out of town with him. Except for the period immediately following the separation, they have continued a close and regular relationship with him. A move to Ottawa even with the communications facilities that

today's technology provides, may very well lessen the closeness and quality of that relationship.

[35] On the issue of desirability of maximizing contact between the children and both parents, section 16(10) of the *Divorce Act* requires that the Court give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child and that the Court take into consideration for that purpose the willingness of the person seeking custody to facilitate such contact.

[36] There is no question that the children's relationship with their father will be disrupted and made more difficult if they move to Ottawa. There was little evidence about the parties' financial situation but even if it is healthy, the cost of travel from Yellowknife to Ottawa and back is not insignificant. The trip is also a lengthy one. It is likely there will be large gaps between the times when the children are with the Respondent. Although the Petitioner testified that she will agree to generous access, her refusal to allow any access during the week in Yellowknife indicates some inflexibility on her part.

[37] Understandably, the children were not called as witnesses on the application. The only evidence I have about their views comes from the parties and can reasonably be expected to be coloured by their own perceptions and feelings.

[38] The Petitioner testified that she talked to the children about the move and showed them pictures of houses, some with swimming pools. She testified that the daughter was initially concerned but then became positive about the move. After spending time with the Respondent after that, according to the Petitioner, the daughter would say that Ottawa is a bad place and she would never see her father. The Petitioner said the daughter was reassured when told she would be able to visit with the Respondent.

[39] The Petitioner testified that the 7 year old son wants to go where his mother goes, no matter where that might be.

[40] The Respondent testified that the children always say they would like to stay with him more. They are scared and sad at the thought of moving away. He said that they were excited at first but were under the impression that they would see him every weekend. When he told them that would not be possible, it "took the wind out of their

sails". The son became aggressive and grumpy for a while. The Respondent feels that the children need counseling but says that after he took them a few times the Petitioner refused to allow him to continue.

[41] No evidence was presented from the counselor, which might be helpful in assessing the views of the children and the impact on them of the proposed move. This may be a case where an independent assessment would also be of assistance and within the means of the parties. Counsel for the Respondent also suggested that the children's teachers might provide some relevant evidence on a trial.

[42] *Gordon v. Goertz* indicates that the parent's reason for the proposed move is to be considered only where it is relevant to that parent's ability to meet the needs of the child. In this case, there is no evidence that the Petitioner's ability to contribute to the support of the children would be significantly enhanced if she were to move to Ottawa and this is not a case of transferring to a higher paying job or for study that will eventually lead to greater employment opportunities. While more time with the Petitioner's parents may benefit the children, the stresses caused by her father's dementia and the effect on the household are unknown and were not explored in the evidence. And although the advantage of her mother's support will likely benefit the children, that has to be weighed against the adverse effect the move is likely to have on their relationship with their father.

[43] If the Petitioner were to move to Ottawa without the children, that would result in a disruption to the children. Apart from the close relationship they have with the Petitioner, it also appears from the evidence that the Petitioner's lifestyle and care of them is more organized and structured than the Respondent's, in part because she does not travel as much as he does. On the other hand, if the children move to Ottawa that would result in disruption to them as they have only ever lived in Yellowknife, a much smaller community. Although they do not have extended family here, according to the Respondent he has friends whom he considers like aunts and uncles to the children, although according to the Petitioner's testimony, they are not involved when the children are with her. The main disruption, however, would be in their relationship with the Respondent.

[44] I am mindful of the fact that the children are more likely to be happy if their mother is happy and that if she is unhappy living in Yellowknife that will adversely affect them. I am also mindful of the need to give her views respect. She is of the

view that the move to Ottawa would be best for the children. She does, however, have a supportive relationship in Yellowknife with the man she has been dating. There is no detriment to the children in staying in Yellowknife, at least on an interim basis. There was no evidence of specific instances when the Petitioner needed assistance but could not obtain it. The benefit to the children in remaining in Yellowknife is their continued close proximity to and relationship with the Respondent.

[45] Having reviewed the *Gordon v. Goertz* factors, under the test in *Plumley*, I should consider whether there is a genuine issue for trial. Considering the balancing of the factors required, I think there is a genuine issue as to what is in the best interests of these children. It may be that the Petitioner's position will prevail at trial, but I cannot say with certainty that there is a strong probability of that. There are no compelling or urgent circumstances that dictate a move at this time. Finally, I am not persuaded that on an interim basis the children's best interests would be served by moving to Ottawa and disrupting their time and relationship with the Respondent.

[46] Accordingly, there will be an interim order that the parties have joint custody of the children and that they be in the day to day care of the Petitioner with the Respondent to have access as set out in the order of February 23, 2007 and as otherwise agreed upon by the parties or ordered by the Court.

[47] The request to relocate the children to Ottawa on an interim basis is denied. Should this matter proceed to a final hearing, it should be given priority in scheduling with a view to setting a date well before the start of the next school year. I also urge counsel to consider the merits of obtaining an objective assessment of the children's wishes and reactions to the proposed move.

[48] Counsel may arrange to speak to costs before me if they so wish.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 10th day of March, 2008

Counsel for the Petitioner: Katherine Peterson, Q.C.
Counsel for the Respondent: Anne Ferguson Switzer