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1994 CarswellAlta 381, 4 R.F.L. (4th) 358, 158 A.R. 139

Ellet v. Ellet

HEIDI ALISHA MARIE ELLET v. REGINALD DERRICK JOSHUA ELLET

Alberta Court of Queen's Bench

Hembroff J.

Judgment: June 16, 1994
Docket: Doc. Lethbridge 4806-09580

Counsel: *Janet F. Gaetano*, for petitioner.

Richard A. ***Low***, for respondent.

Subject: Family

Family Law --- Custody and access — Practice and procedure

Children — Custody and access — Procedure — Change of venue — Mother being custodial parent — Mother moving from Alberta to British Columbia with children, allegedly to get away from oppressive and abusive father — Father applying for change in custody — Mother applying to transfer proceedings to British Columbia — Children "most substantially connected" with Alberta — Application to transfer proceedings dismissed — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 6(3).

The parents were married in 1985 and divorced in 1993. The mother was granted custody of their three children. The father was granted reasonable access. The children were born and raised in Alberta, where they maintained a strong relationship with many of their extended family members. To escape what she believed was the oppressive and abusive nature of the father, the mother moved with the children to British Columbia. In spite of her attempts to impede his right of access, the father made substantial efforts to see the children. The father applied for a change in the custody arrangement and to have the terms of summer access specified pending the determination of the custody application. A trial of the custody issue was ordered.

The mother applied to transfer the proceedings to British Columbia.

Held:

The application to transfer was dismissed.

Given that the children had been residing in British Columbia for only eight months and that the father was well rooted in Alberta, the children's "most substantial connection" favoured Alberta. Furthermore, it was in the children's best interests to deal with the variation of custody application as quickly as possible, which urgency could best be met by the Alberta courts, which had dealt with the matter at some length. The issue was to be tried, not necessarily where the children were, but where their roots were and where their welfare could be decided by a court. Accordingly, the application to transfer the custody proceedings should be dismissed.

Cases considered:

Astle v. Walton (1987), 10 R.F.L. (3d) 199, 44 D.L.R. (4th) 700, 85 A.R. 331 (Q.B.) — *applied*

Chenkie v. Chenkie (1987), 6 R.F.L. (3d) 371, 50 Alta. L.R. (2d) 41, 76 A.R. 224 (Q.B.) — *referred to*

Kermeen v. Kermeen (1989), 93 N.S.R. (2d) 28, 242 A.P.R. 28 (Fam. Ct.) — *applied*

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) —

s. 6

s. 6(3)

Application by mother to transfer custody proceedings from Alberta to British Columbia.

***Hembroff J.*:**

1 When this matter was first brought forward, it was brought by the former husband, Reginald Derrick Ellet (the applicant). The initial request was for a change in custody from the former wife (the respondent) to the applicant. A subsequent application was also brought by the applicant seeking to specify terms of summer access to the children of the marriage pending the outcome of the custody application. After the commencement of the variation application, a consent order was granted by me requiring there be a trial of that issue and further authorizing the conduct of examinations for discovery. The order was presented by the applicant and consented to by the respondent through her solicitor.

2 During the course of further discussions between the parties and myself, and as the children had been moved to British Columbia by their mother, the question of the proper place for the hearing of the custody matter, whether it be British Columbia or Alberta, came up and had to be dealt with.

3 A special application was held before me in open chambers on Friday, June the 10th, at which time the question of summer access and the question of the location of the trial were in issue.

4 After hearing this application, I provided the applicant specified summer access, with certain conditions involved. That order was given in chambers and will be filed separately from this order. It is possible as a result of the summertime access ordered to the father, the custody may be resolved as well. Nevertheless, I undertook to provide the parties a decision as to the place of the trial and reasons for that decision.

5 This initial decision as to the place of trial has to be made as a result of a special chambers application heard by me on the 20th of May of 1994. At that time, counsel for the mother of the children advised she inten-

ded to make this transfer application to have the variation proceedings moved to British Columbia pursuant to section 6(3) of the *Divorce Act*.

6 The relevant facts, briefly, are as follows. The parties were married in 1985 and were divorced in September of 1993. The mother, Heidi Ellet, was granted custody of their three children, Hans Aaron, now age 8, Joyanne Michelle Elaine, now age 6, and Alan Lynn, now age 5. The father was granted reasonable access.

7 The marriage was essentially a volatile one, in which varying restraining orders were granted by this court to the petitioning wife against the husband. At one time, the wife left the matrimonial home to find shelter in a battered woman's shelter in Lethbridge, Alberta.

8 The divorce was based on mental and physical abuse of the petitioning wife by the husband. These allegations were continued in various affidavits relative to these proceedings. The allegations contained in the more recent affidavits have been largely denied by the husband.

9 The mother of the children has been the primary caregiver of the children, and they have always remained in her care. She has moved to various places in and around southern Alberta, and in December of 1992 moved to Calgary. The extended family of the children resides almost exclusively in southern Alberta.

10 In the fall of 1993, the mother of the children made up her mind to move to the province of British Columbia and is presently residing on Vancouver Island. She states she moved to the coast to get away from the oppressive and abusive nature of her former husband. He denies the allegations of oppression or abuse. He says the reason she stated to him she went to the coast was that Alberta Social Services, which had been supporting her in this province, indicated she either had to get a job or go to school, or her welfare would be cut off. He alleges the mother also indicated B.C. had more generous welfare benefits. The mother denies these as being the reasons for her move to British Columbia. It is not my intention to make any finding in that regard. The fact of the matter is since late 1993 the mother and children have been in British Columbia. The variation application was commenced in March in this court.

11 So far as the matter of access is concerned, by her own admission, the mother has made access somewhat difficult for the husband. This difficulty arises, she says, as a result of the abusive nature of the father. Nevertheless, the father has exercised pretty well all of the access allowed him. Justice MacLean gave an order for some specified access, and this has been followed. The father had access to the children in Calgary. The father has also had access to the children on a day basis only in British Columbia. He has tried to phone and write to the children, but the mother has made this difficult for him. As she said, she was concerned his actions and his attitudes were bad for the children, that they didn't want to see him in any event, and thus she wouldn't even give the applicant her phone number or address.

12 Since taking the children to British Columbia, the mother has them settled in school. Initially and for some significant amount of time, the entire family, the mother and three children, lived with a female friend and seven children. This arrangement continued from about the end of October 1993 into February of 1994. At that time the present accommodation was found; the Ellets moved out of the friend's home, established their own residence, and then organized their lives. During that transitional period, the children were frequently not at school.

13 The friend, Sheila Margaret Kennedy, who gave an affidavit in these proceedings, will have much to say about the question of custody, as she observed Mrs. Ellet and the children when they arrived in British Columbia in late 1993, and that relationship was continued to the present.

14 Similarly, there will be a school teacher and a school principal who will have some important input into the custody process, wherever it is located. Additionally, others will be needed to support the position of the mother in the custody application. One of these is a Mr. Raymond L. World, an official of the church to which the Ellets belong and attend in British Columbia.

15 Since February of 1994, the family has been involved in a program for children who witness abuse. This is conducted by one Sonya Boya, a master of science in clinical psychology, whose letter of May 9th, 1994, is attached to an affidavit sworn by Mrs. Ellet on the 11th of May. In her letter Ms Boya indicates she has been providing ongoing counselling for the children and parenting support for their mother. It is further indicated she has just got started at this process and will require some further time with the children.

16 As indicated previously, the children were born and raised in the province of Alberta, particularly in southern Alberta. Their father is here. They have their extended family here and apparently there is a strong relationship with many of these extended family members.

17 During the time the mother and children spent in Calgary, they were in contact with a number of people there who also will have some input to provide into the question of custody and whether or not it should be varied.

18 Additionally, the children attended a support group counsellor while the mother was at Harbour House in Lethbridge, and further received support when they stayed at Discovery House in Calgary.

19 I list the numbers of persons involved with the children in each of the varying locales to indicate that my decision as to the choice of venue will not be influenced by a "balance of convenience" argument. As I indicated to counsel during the application, it would appear there is very little to choose between the convenience to the father and to the mother. It would be most convenient to each if the application were heard in their respective jurisdictions and very inconvenient to each to have to attend in the jurisdiction where the other lives.

20 That then brings me to the crux of the matter. Are the children most substantially connected with the province of Alberta or with the province of British Columbia? This is the test as set out in the *Divorce Act* and as applied by various courts, including our own Court of Queen's Bench.

21 This application is made pursuant to section 6(3) of the *Divorce Act*, which reads as follows:

> (3) Where an application for a variation order in respect of a custody order is made in a variation proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the variation order is sought *is most substantially connected with another province, the Court may, on application by a former spouse* or on its own motion, transfer the variation proceeding to a court in that other province. [Emphasis added.]

22 The question here to be answered is "what province are the three children of this marriage most substantially connected to?"

23 As I review the material before me, I am satisfied, and I find, the children are most substantially connected with the province of Alberta. I base this on a number of factors which I will set out below. I have reviewed the case material provided me by counsel and am particularly compelled by the reasoning of Lutz J. in *Astle v. Walton* (1987), 10 R.F.L. (3d) 199 (Alta. Q.B.), as he dealt with the matter before him and as he referred to and

discussed the decision of Veit J., *Chenkie v. Chenkie* (1987), 50 Alta. L.R. (2d) 41 (Q.B.).

24 Counsel for the mother in this particular case suggested the substantial connection most importantly relates to the question of the immediacy of the location of the children. Certainly that is an important factor, as suggested by Justice Veit, but not the only factor. The children have only been in British Columbia for a little more than half a year. In fact, the father's application was commenced when they had been taken out of the province and remained out of the province for less than half a year. During that period of time, the children had not been established in school, although they are now more established. It must be remembered this application is not to move the children but rather to consider what court, either the B.C. Supreme Court or the Alberta Court of Queen's Bench, is the one to make the ultimate decision.

25 I base my own decision on the following factors:

- The children were all born in Alberta and spent substantially all of their lives here.
- The children haven't been in British Columbia very long (about 8 months).
- The children have many relatives in Alberta and none in British Columbia.
- The father has made substantial efforts, in spite of difficulty, to obtain and enjoy access to all of the children.
- The father is well rooted in Alberta, and while the mother says she intends to stay in British Columbia, it is certainly not clear she has put down any substantial roots.
- Even if I were to consider the balance of convenience,which I have already spoken to, that is equal in any event.
- The interference with access by the mother is not in the children's best interests because it is necessary that they maintain a father-child bond with their non-custodial parent.
- Initially, the mother consented to have the application heard in this court and her consent order is on file.
- The matter has been a long and difficult one and has been dealt with at some length by the Alberta courts. As I consider it very substantially in the best interests of the children to deal with the variation of custody application as quickly as possible, it is my view this required urgency will be best met by the Alberta courts. The B.C. courts would have to start from the beginning.

26 Taken as a whole and as is suggested by Justice Lutz at page 205 in his judgment, section 6 of the Act should be interpreted with sufficient flexibility to keep in mind our primary consideration is always the best interests of the children.

27 Certainly the mother and the children live in British Columbia. Certainly they have been enrolled in school or kindergarten there. Certainly from the uncontradicted affidavit evidence presently available, they are now coming along quite well. Nevertheless, these are the very matters that might be taken into account at the custody application. The very short term and somewhat less than substantial connection of the children with the province of British Columbia persuades me their most substantial connection is still with the province of Al-

berta.

28 In my view, the court that deals with the welfare of the children should be the one that would best deal with the matter of custody on a fair, full, equitable, and urgent basis. The issue should be tried, not necessarily where the child is, but where its roots are and where its real welfare can be decided by a court. This was as suggested by Judge Niedermayer of the Nova Scotia Family Court in *Kermeen v. Kermeen* (1984), 93 N.S.R. (2d) 28, at page 32.

29 I would hope with the specified summer access provided, the urgency for that aspect of the matter is diminished and the parties might now direct their minds to coming to a more permanent, mutually agreed arrangement, which would only benefit the children. If they cannot, I would urge the parties to get the matter into the courts in the province of Alberta as quickly as possible, so the major issue of custody can be properly heard.

30 The application to transfer the custody proceedings to British Columbia is thus dismissed. The matter of costs was not dealt with to any extent, but I would simply order the costs of this application shall be costs in the cause.

Application to transfer dismissed.

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