SUPREME COURT OF YUKON

Citation: *M.L.M. v. D.G.W.*, 2021 YKSC 6

Date: 20210118
S.C. No.: 17-D4949
Registry: Whitehorse

BETWEEN:

M.L.M.

Plaintiff

AND

D.G.W.

Defendant

Before Chief Justice S.M. Duncan

Appearances:

Sarah Hart	Counsel for the Plaintiff
Amy Steele	Counsel for the Defendant

REASONS FOR JUDGMENT

[1] DUNCAN C.J. (Oral): This is an application brought by the defendant, D.G.W., pursuant to the order of Justice Mulligan of September 13, 2019. He ordered a review before March 2020 of his order for supervised access to D.G.W. of the child of their relationship for two times a month, for three hours and then four hours, per visit. But largely because of the effect of COVID-19 pandemic on court time, this application for review was not brought until December 2020 and the hearing was not completed until January 8, 2021.

[2] In this application, D.G.W. seeks a graduated increase in her access and the removal of the requirement for supervision. Specifically, she proposes five hours per

week, supervised for the first month from the date of this decision and that visits occur at her home supervised by one of two new proposed supervisors. She requests that access for the next month, the second month from the date of the decision, be five hours per week, unsupervised; and by the third month from the date of this decision, increased access to 10 hours per week, unsupervised, and continuing indefinitely.

[3] The respondent, M.L.M., opposes this increased unsupervised access. He says he requires more information about what counselling D.G.W. is taking and her progress. He would like evidence of the work she is doing to improve her parenting skills, such as through parenting courses, and he is concerned about her volatility and sense of responsibility, evidenced by the current criminal charges she is facing.

Issue

[4] The issue in this application is: What is in the best interests of the child? I will first review the background briefly and then I will refer to the applicable law, and then provide my analysis and conclusion.

Background

[5] The plaintiff, M.L.M., is 38 years old. He and the defendant, D.G.W., who is 26, were married on January 1, 2016, in Whitehorse. D.G.W. is a member of the Kluane First Nation. There is one child of the relationship, M.J.M., born October 15, 2015, now five years old. She is a member of Champagne-Aishihik First Nation, like her maternal grandmother.

[6] D.G.W. left the family home in July 2016 and the relationship with M.L.M. ended in August 2016. Family and Children's Services became involved in July 2016 at the parties' request for support and a social worker was assigned. D.G.W. was having panic

attacks and mental health symptoms, including suicidal ideation, affecting her ability to care for M.J.M. Family and Children's Services worked with both parents between August 2016 and February 2017, and provided various supports to both.

[7] Family and Children's Services had child protection concerns about D.G.W. related to her unstable mental health at that time. This was demonstrated by her inability to attend arranged visits with M.J.M. or scheduled meetings with her supports consistently and her aggressive and escalating behaviour towards M.L.M. in the presence of M.J.M. Supports were offered to D.G.W., such as connecting with Challenge, connecting with a Champagne-Aishihik First Nation liaison worker, and a psychological assessment, but these were not pursued by her.

[8] Family and Children's Services also had concerns about M.L.M.'s ability to set boundaries around D.G.W. initially, including not reporting troubling incidents and allowing access to her that was not authorized by Family and Children's Services. He worked with Family and Children's Services diligently and, ultimately, Family and Children's Services was satisfied that he was able to keep M.J.M. safe.

[9] M.L.M. was awarded interim custody in June 2017 and Family and Children's Services closed its file after recommending that any access to M.J.M. by D.G.W. should be at M.L.M.'s discretion.

[10] On June 27, 2017, a court order confirmed access by D.G.W. to M.J.M. at M.L.M.'s discretion. D.G.W. did not appear at this hearing. The Court, at that time, also made a restraining order against D.G.W.

[11] After an application was brought by D.G.W., the Court in September 2019 — and this is the Justice Mulligan order — set out a schedule for supervised access specifying

location and supervisors; specifically M.L.M.'s brother and his friend, two times a month. The order provided for a review by March 2020. When this did not occur, the access visits did continue, more or less, in the same way as specified in the order, with some adjustments for COVID restrictions and over the Christmas break.

[12] In the meantime, D.G.W. had breached the restraining order and had been charged criminally. She obtained a conditional sentence and probation order. The terms of her probation order included a no contact condition with M.L.M. and a condition to remain 100 metres away from any known residence, employment, or place of education of M.L.M.

[13] D.G.W. was found guilty of a breach of this term and given a conditional sentence, which included the same no contact order and remain 100 metres away.

[14] In December 2020, D.G.W. was again charged as a result of an alleged breach of the no contact order. Her first appearance on these latest breach charges is this month.

Law

[15] Turning to the legal principles, the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), applies in this case because the parties are married and the plaintiff is seeking a divorce. The best interests of the child is a factor to be considered in deciding custody and access issues — and that is s. 16(8) of the *Divorce Act*.

[16] The *Divorce Act* also includes the presumption, in s. 16(10), that maximum contact with both parents after separation and divorce is in the child's best interests. The key issue for the Court to determine is: What access arrangement is in the child's best interests?

[17] Both counsel have appeared to argue this application on the basis that a material change in circumstances is a relevant inquiry. However, I do not agree that this is the law under the *Divorce Act* when the Court orders a review of the provision of an order, as in this case, within a specific timeframe.

[18] Review hearings were discussed in the 2014 decision of *L.E.S. v M.J.S.*, 2014 NSSC 34. This was a case of a review hearing to determine the father's access. The Nova Scotia court relied on the Supreme Court of Canada decision in *Leskun v. Leskun*, 2006 SCC 25, and that was decided in a spousal support case but it is still relevant, in my view, in an access case.

[19] The Supreme Court of Canada explained review hearings as follows — and I am quoting now from the *L.E.S. v. M.J.S.* case, at para. 63:

> [63] ... wherever possible, a judge should determine all the parties' claims and make an order that is permanent, subject to variation upon proof of a change in circumstances. In some cases this may not be possible because a particular circumstance is unknown. If the judge thinks it's essential to identify an issue for future review, that issue should be tightly circumscribed. This is necessary because in a review hearing neither party bears the burden of proving a change in circumstances, while this is necessary in a variation application pursuant to section 17 of the *Divorce Act*. If the scope of the review isn't constrained, either party may try to use the review to re-litigate.

[20] Further on at para. 68, the Court writes:

> [68] While neither party bears an onus of proving that there's been a material change in circumstances since the last order was granted, it must be shown that his or her plan for access is in the children's best interests.

[21] I adopt this interpretation and I note that I must take into account all of the circumstances as shown in the evidence in order to determine whether D.G.W.'s proposal for increased access is in M.J.M.'s best interests.

Analysis

[22] Turning to the analysis, I find that D.G.W. has made some positive changes in her life as she matures. I recognize she has experienced trauma and abuse in her early years. She appears to be accessing more supports now: Legal Aid, proposed supervisors who attended at the court hearing, some evidence of counselling, and she now has her own apartment where she has set up a room for M.J.M. She has a strong desire to see her daughter, to establish a relationship with her, to share her cultural traditions with her. She continues to be sober; drug and alcohol free. These are all positive improvements in her life. Some of these have occurred recently and others have been ongoing since 2017.

[23] However, there do remain some significant concerns, partly as a result of gaps in information provided both to M.L.M. and to the Court. These concerns are as follows.

[24] First, D.G.W. has been inconsistent in her attendance at access visits, as demonstrated by the affidavit evidence and exhibits from M.L.M. In some cases, she provided explanations that are good and carry some weight, such as sickness, change of medication which caused her to sleep through her alarm. However, there were other times when there was either no explanation or the explanation was unsatisfactory, such as one occasion when there was no response for an offered visit of September 20th and another time when she asked to change the time of the visits but never confirmed. This inconsistency, although not nearly as bad as it appeared to have been in 2017, is still troubling because of the effect of cancelled visits on M.J.M., especially as she grows older and becomes more aware. It can create disappointment and can lead to lack of trust.

[25] A second concern is some of D.G.W.'s behaviour while she is with M.J.M. on access visits, as described by the supervisors. They describe incidents such as her falling asleep while watching videos with M.J.M. at the library, inappropriate conversation subjects, and a failure to plan activities resulting in M.J.M. being bored. D.G.W. says she has not taken any parenting courses except for the Sake of the Children. This is a concern because it appears she has not yet developed the good parenting skills to allow her to behave in a way that supports M.J.M. and is in her best interests.

[26] Thirdly, D.G.W. provided limited information about counselling she has been and is receiving. She has a long-standing relationship with her physician, Dr. Adrienne Mayes, which is very positive. Dr. Mayes confirms her sobriety and says that she is treating D.G.W. for her anxiety disorder and complex trauma. As of December 2, 2020, Dr. Mayes was awaiting a formal consult from psychiatry.

[27] The information about counselling consists of two letters: one from Joseph Graham, dated August 20, 2019, confirming that D.G.W. had seen him for three sessions and was booked for three more. The purpose, in Joseph Graham's words, was:

> ... to continue the process towards the primary goal of being granted equal parenting time and greater effective communicative and collaborative skills.

[28] There is no further information since August 20, 2019, from Joseph Graham.

[29] There is one email addressed to Ms. Steele from Michael Buurman of Mental Wellness and Substance Use Services, dated December 3, 2020, confirming that he and D.G.W. have been connecting since September 2, 2020, on average a biweekly basis. He has been working in collaboration with her family physician to ensure she is

connected with psychiatric services and his primary role is to provide basic support, stability, and some coping strategies. He confirms that she is currently on the waitlist for the anxiety group. There is nothing in this material from a psychiatrist or anything about psychiatric services that D.G.W. is accessing. This lack of information about D.G.W.'s current mental health condition is a legitimate concern that affects the decision about whether or not to increase her access with M.J.M., especially unsupervised access.

[30] The fourth and final concern is the ongoing criminal charges. I recognize that they are breaches of conditions in a probation order and they may not be therefore as serious as new criminal charges, but the ongoing failure of D.G.W. to comply with court orders, even if it was because of an intense desire to see her daughter, which was the explanation provided for previous breaches, still shows a lack of self-restraint, stability, and good judgment. It shows a failure to put M.J.M.'s interests first by ensuring her own compliance with lawful authority so that she is available for M.J.M. It also does not help to develop the trust relationship between her and M.L.M., which is an element that should be there in a positive co-parenting relationship.

[31] These concerns lead me to conclude that D.G.W.'s proposal to move towards unsupervised access within the next couple months is premature. Before this can happen, there needs to be more information about the kind of counselling and any psychiatric help she is receiving, her progress in treatment, and her future plans. She also needs to show evidence that she has taken parenting courses and how it has changed her approach to her time with M.J.M. Thirdly, her current criminal charges should be resolved. And fourthly, a period of stability and consistency in her visits with M.J.M. as objectively documented by her supervisors should be established.

[32] In my view, D.G.W.'s proposal of supervisors, Ms. Pillai and Ms. Walsh, is appropriate. I understand that M.L.M. does not agree with Ms. Pillai as a supervisor because he said during their conversation she did not appear to understand his concerns. Ms. Pillai is currently the senior advisor on Aboriginal Women's Issues at the Women's Directorate. She has experience with people who have similar experiences as D.G.W. and I agree that she is a suitable supervisor.

[33] Ms. Walsh is also proposed as a supervisor. She works at the Women's Transition Home and, again, is familiar with people who have had experiences and backgrounds similar to D.G.W. M.L.M. has not yet opposed Ms. Walsh because he has not yet had a chance to speak with her, but, in any event, I find that she is a reasonable choice for a supervisor. In my view, both of these women could help D.G.W. with her parenting skills and self-development, and this would be in M.J.M.'s best interests.

[34] M.L.M. has not disagreed with the proposal to have M.J.M.'s access visits at D.G.W.'s home, which is an apartment where she lives by herself, where she lives by herself. I agree that this is a more natural environment for D.G.W. to establish a relationship with M.J.M. It may help with ensuring consistent visits and allow for more options for activities for them to do together. Access, of course, can also be outside the home. That also remains an option.

[35] Other suitable supervisors, in my view, are D.G.W.'s Aunt S. and Uncle L., N.M, and J.F. These are alternates if Ms. Pillai or Ms. Walsh are not available.

[36] D.G.W. had requested that her father, W.S., act as a supervisor. M.L.M. is opposed to him as a supervisor. I find that I would need more information that is

objectively verifiable about why he is unsuitable or not before deciding whether he is an appropriate supervisor.

[37] The proposal of five hours a week is too much of a leap from the two hours that have been given to D.G.W. to this point, especially given the inconsistencies to date. It may also be difficult to get supervisors for that period of time. However, I do note that in Justice Mulligan's order, he allowed for visits up to four hours at a time. I will allow visits for up to four hours at a time, three times a month, for the next three and a half to four months, and then the matter shall return to court for another review.

[38] So before May 17th, which is a Monday, this matter shall come back to court for a review. If a change in access is requested at that time, please note the concerns that I have expressed here with respect to the gaps in information that have affected my decision.

[39] To conclude, supervised access is to continue up to four hours at a time per visit. In other words, it does not have to be for four hours, but you can have a maximum of four hours, three times per month, and such times to be arranged by the parties. The access visits may be at the home of D.G.W. or at a public place. The first choice of supervisors shall be Delilah Pillai and Jolene Walsh. Those would be the first choices of supervisors, either one. If they are unavailable, then other appropriate supervisors are Aunt S. and Uncle L., N.M., and J.F. The matter shall return to court before May 17, 2021.

____

DUNCAN C.J.