SUPREME COURT OF YUKON

Citation: *B.L.T. v. L.D.M.*, 2021 YKSC 9

Date: 20210203
S.C. No.: 20-B0021
Registry: Whitehorse

BETWEEN:

B.L.T.

PLAINTIFF

AND

L.D.M.

DEFENDANT

Before Justice K. Wenckebach

Appearances:
Malcolm E.J. Campbell — Counsel for the Plaintiff
Gregory Johannson — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] WENCKEBACH J. (Oral): In this matter, the plaintiff, B.L.T., filed a notice of application seeking custody of the child of the relationship, L.G.M. ("L."), born September 18, 2015, and child support, amongst other relief. The defendant, L.D.M., filed a cross-application seeking that the child be returned to his original home, Manitoba. At the hearing, the question of child support was deferred until after the issue of custody is decided. The issues before the Court today are: who should have custody; and whether L. should be returned to Manitoba.

The Facts

[2] The parties were in a relationship starting in about 2013 or 2014. There seems to be disagreement about when the relationship ended but it possibly continued until 2019. B.L.T. and L.D.M. have a child together, L., who is five years old. The parties lived in Manitoba during the entirety of their relationship. B.L.T. has a son, O., from another relationship. L.D.M. also has a child, M., from another relationship.

[3] B.L.T. and L.D.M. describe the relationship in very different ways. According to B.L.T., she, O., and L. were frequently abused by L.D.M. L.D.M., in contrast, describes the relationship in which he was an active and involved parent and partner.

[4] In December 2019, L.D.M. was charged with assault against L. and O. He was put on no contact conditions with the children. The charges have not yet been resolved.

[5] B.L.T. moved with L. from Manitoba to Yukon without notice to L.D.M. in March 2020. She attests that she did so because L.D.M. cyber-stalked her and because L.D.M.'s sister and mother intimidated her. B.L.T. has resided here since then with L. and her new partner while O. was left in his father's care.

[6] L.D.M. denies that he was violent or intimidating, either during or after the relationship, and seeks to have L. returned to Manitoba.

Analysis

[7] In his submissions, counsel for B.L.T. acknowledged that the affidavits filed by the parties were contradictory and that credibility may be difficult to assess. Nonetheless, he stated that the objective facts of the case are: that B.L.T. fled from L.D.M.; that she is in counselling for trauma; and that L.D.M. has been charged with

assaulting L. and O. B.L.T. maintains that she and the children were abused by L.D.M. and is seeking custody on that basis.

[8] For his part, the defendant asks that the Court order L. to be returned to Manitoba under s. 49 of the *Children's Law Act*, R.S.Y., 2002, c. 31 ("*Children's Law Act*") or, alternatively, under s. 33. The defendant argues that the plaintiff brought L. to Yukon Territory in order to pursue a romantic relationship. She did so impulsively and without regard to L.'s best interests. To use the language of s. 49, the plaintiff "wrongfully brought" L. to the Yukon. B.L.T. also left her son O. in Manitoba when she moved to Yukon, which also demonstrates poor parenting. In this way, the defendant submits that L. should be returned to Manitoba and that the plaintiff could then be at liberty to make an application from there to relocate back to Yukon.

[9] There was one piece of evidence that raised issues in the proceeding. B.L.T. attached a voice recording of a conversation she and L.D.M. had had to one of her exhibits. In her affidavit, she stated only that the recording was "of a conversation that we" — that is, B.L.T. and L.D.M. — "had during our relationship shortly after I found out that I was pregnant with L.".

[10] L.D.M. did not respond in his affidavit to the recording. In argument, L.D.M.'s counsel objected to the admission of the recording. He stated that I could infer that the recording was made without L.D.M.'s consent and was therefore illegal. On the basis of *B.D.C. v. B.J.B.*, 2012 YKSC 64, it would bring the administration of justice into disrepute if the evidence is admitted. He also argued that the evidence was not relevant.

[11] B.L.T.'s counsel responded that there was no evidence that the recording was made without L.D.M.'s consent and that it was relevant, as it helped to corroborate B.L.T.'s allegations that L.D.M. was abusive.

[12] I find that the recording is inadmissible, not on the basis being sought by the defendant, but because its reliability has not been established. L.D.M. could have addressed the recording in his affidavit but chose not to. As such, I have no evidence from which to infer that the recording was made without L.D.M.'s consent. The recording could also serve to corroborate B.L.T.'s testimony that she was abused by L.D.M. and is therefore relevant.

[13] However, I also have very little information about the context of the recording. B.L.T. has not explained the circumstances of the conversation that was recorded, why it occurred, what came before or after, how it came to be recorded, or why B.L.T. has the recording. As such, its reliability has not been established and it is not admitted as evidence.

[14] In terms of the evidence about L., defendant's counsel notes the parties have provided scant evidence about his circumstances. I agree. Both the plaintiff and the defendant have focused more on the details of their relationship than what is in the best interests for L. The information before me about L.'s circumstances in the Yukon is limited. B.L.T. attests that he is going to school in Whitehorse, that he attended the Child Development Centre, and that he is currently seeing a psychologist on a weekly basis.

[15] While B.L.T. has not provided much evidence about L., the defendant's position that L. should be required to return to Manitoba and that B.L.T. could then make an application to return to Yukon is also problematic.

[16] Firstly, the analysis under s. 49 of the *Children's Law Act* requires me to consider whether L. was wrongfully brought to Yukon. On the evidence before me, I find that B.L.T. did have reason for concern for L.'s safety in Manitoba. For example, B.L.T. provided uncontested testimony that L.D.M.'s sister and mother followed her in grocery stores and attempted to lure L. away from her. This and other evidence provided is sufficient to establish that B.L.T. had some reason to fear for her and her son's security.

[17] I also note that L.D.M. took no steps to seek B.L.T.'s return until after she commenced this application, four months after she left Manitoba. While this does not amount to acquiescence to B.L.T.'s move, it does raise the question of why L.D.M. did not seek B.L.T.'s return earlier.

[18] In making this finding, I am not condoning all of B.L.T.'s actions. B.L.T. could have and should have taken steps, at the very least, to notify L.D.M. of the move and to ensure that she had the legal right to move with L. from Manitoba. Given the circumstances, however, I do not find that L. was wrongfully brought to Yukon.

[19] Moreover, the defendant has provided little information as to why it would be better for L. to live in Manitoba. There is no information before the Court about L.'s roots in Manitoba, about his life or activities when he lived there, or about his contact with extended family. While L.D.M. expresses a wish that L. have a relationship with his half-siblings, including with L.D.M.'s son M., he has not described whether or how this

could occur, given his no contact order with L. Critically, because of his no contact conditions, L.D.M. cannot have custody of L., nor even access.

[20] The no contact conditions are due to criminal charges and will therefore end at some point. However, at present, there does not seem to be anything in Manitoba to send L. to.

[21] Finally, what the defendant seeks would create instability in L's life. L. would be moved to Manitoba, possibly with B.L.T., and if she returns to Manitoba, possibly B.L.T. would make an application to return to the Yukon with L. The uncertainty and instability of this plan is simply not in L.'s best interests.

[22] I therefore order that the plaintiff shall have custody of the child of the relationship, L.G.M., born September 18, 2015.

[DISCUSSIONS]

[23] I will not order #3 because if the parties can work this out between them then that might be the best way forward and until such time as the criminal matters are resolved, he is on a no contact order with L.

[24] With regard to #10 then, I will add that "there will be no communication, directly or indirectly, unless for the purposes of exercising access."

[25] The rest of the terms will be ordered as well.

[26] I think that we can probably set aside the previous order and proceed with this one.

[27] MR. CAMPBELL: Is that going to be a term of this order, that the — I don't ... If I could just have a moment?

(PAUSE)

[28] I don't believe that we need to formally set aside the previous order because it was just an interim-interim order and this one is now the interim order —

[29] THE COURT: You are right. We can just replace it.

[30] MR. CAMPBELL: — but I'm prepared to put it in if Your Ladyship wishes clarity.

[31] THE COURT: Yes, that is fine.

[32] Is there anything else?

[33] MR. JOHANNSON: Nothing else. Thank you, Your Honour.

[34] THE COURT: Mr. Campbell ...?

[35] MR. CAMPBELL: For the purposes of drafting the order, para. 3 is denied?

[36] THE COURT: Yes.

[37] MR. CAMPBELL: Okay. I believe that's everything then.

[38] THE COURT: Thank you.

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WENCKEBACH J.