SUPREME COURT OF YUKON

Citation: *G.J. v. C.M.*, 2021 YKSC 20

Date: 20210317
S.C. No.: 20-B0044
Registry: Whitehorse

BETWEEN:

G.J.

PLAINTIFF

AND

C.M.

DEFENDANT

Before Chief Justice S.M. Duncan

Appearances:
Norah Mooney — Counsel for the Plaintiff
Stephanie Dragoman — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] DUNCAN C.J. (Oral): There are two applications for decision in this matter.

[2] The first was brought by the plaintiff father, G.J., for an order preventing the child, A., from leaving the Yukon without consent of the plaintiff. He also seeks sole custody, although this was revised to joint custody in the alternative during submissions.

[3] The second application was brought by the defendant mother, C.M., for an order for sole custody of A: allowing her to relocate to Nanaimo with A. and travel without the plaintiff's consent; allowing access by the plaintiff to A. via telephone and FaceTime on conditions; child support plus arrears of child support and related orders about financial

information; and the cost of the counterclaim. C.M. also asked that A. be registered as a member of Champagne-Aishihik First Nation.

[4] The main issue for determination here is the relocation request. The two related and secondary issues are custody and access, and then, finally, support.

[5] I will first review the factual background, the history of this application, the legal principles, my analysis, and conclusion.

Background

[6] G.J. and C.M. were in a relationship from February 2017 to May 2019. Both were born and raised in the Yukon. G.J. was originally a citizen of Ta'an Kwäch'än Council. He transferred to Champagne-Aishihik First Nation and he is now a citizen of Champagne-Aishihik First Nation. They are the parents of A., born [redacted], when G.J. was 21 and C.M. was 19. They began living together in January 2018.

[7] After A.'s birth, they moved into the plaintiff's paternal grandparents' home. Both grandparents, T.C. and M.J.J., are very involved in the plaintiff's life. In fact, they have raised him since he was five months old. Both grandparents filed several affidavits in these applications.

[8] After several months of living with the grandparents, the couple moved into a place of their own in [redacted] in December 2018.

[9] Their relationship was rocky. In May 2019, G.J. was charged with assaulting C.M. They separated. In September 2019, he was charged with another assault and unlawful confinement of C.M. G.J. pled guilty and has been participating in Community Wellness Court since October 2019. After the first assault, there was a no contact condition in place between G.J. and C.M. After the second assault, a no contact

condition between A. and G.J. was in place, but this was removed after he was accepted into Community Wellness Court.

[10] C.M. has been the primary caregiver for A. since her birth and particularly after the separation in May 2019. G.J.'s "access" — and I am using this word for simplicity even though there is no custody order in place — has been steadily increasing over the past six months to a year. Access to A. by G.J. has been facilitated by T.C. and M.J.J. They have done pick-ups and drop-offs, and provided support during visits.

[11] Between November 2019 and September 2020, visits were regular but limited in duration amounting to approximately 50 days, including some overnights and weekends. Many of the visits, though, were with extended members of G.J.'s family. He has nine siblings and a number of aunts and uncles.

[12] On or about August 24, 2020, C.M. sent G.J. a consent order to sign allowing her to relocate with A. to Nanaimo, where her parents, siblings, and extended family members now live. G.J. refused to sign it. He then learned through Facebook that C.M. was selling her belongings and intending to move to Nanaimo. This prompted G.J. to bring an emergency application to court to prevent C.M. from leaving the Yukon. It was heard on September 24, 2020.

[13] At that court hearing, C.M. was not represented, although she said at the hearing and in her affidavit that she had been to the Family Law Information Centre, who had helped her draft the consent order and affidavit for court. She represented to the Court at that time that she had a plane ticket for September 26, 2020 for Nanaimo; that she had a job interview for an office administrator at a gymnastics business and other applications for work under consideration; that her father had rented the trailer where

she was living in Whitehorse, which he owned, to someone else so that she would have nowhere to live by October 1st.

[14] I issued an interim-interim order at that time providing that A. was not to leave the Yukon without the consent of G.J. or a court order pending a full hearing on the relocation issue.

[15] After that court hearing in September 2020, the grandparents of G.J. testified in their affidavits that communication with C.M. became much more difficult. Before this, T.C. swears that he and M.J.J. were in constant contact with C.M. For example, they provided transportation to and from daycare, school, shopping, banking; provided babysitting numerous times when C.M. wanted a break; and they also bought supplies and helped out financially from time to time. After September 2020, C.M. was not at home at the time of prearranged visits, and did not answer texts and calls from T.C. and M.J.J. She also made it more difficult for G.J. to have access visits with A.

[16] Between September 2020 and mid-February, nonetheless, 24 days of visits approximately twice a month occurred between G.J. and A. The last two visits were both for four days.

[17] Since participating in Community Wellness Court, G.J. has taken the following courses and treatments: first, he completed the Substance Abuse Management Course in the fall of 2019; second, he completed the Inpatient Treatment Program at Mental Wellness and Substance Use Services in January 2020 — and before that he completed the Foundations Program; third, he is seeing a counsellor regularly at the Mental Wellness office in [Yukon community] — and before this he was seeing Michael Bergman, a counsellor in Whitehorse regularly; fourth, he is taking the Respectful

Relations Course; and fifth, he has attended Alcoholics Anonymous and Narcotics Anonymous meetings.

[18] In the summer of 2020, G.J. was employed by Champagne-Aishihik First Nation at a greenhouse. He earned $15,204.

[19] After that, G.J. moved to [Yukon community]. His grandparents also relocated from Whitehorse to [Yukon community] in the fall of 2020. G.J. had been accepted into the Interpretive Guide Program in [Yukon community] in February 2020. It was unfortunately interrupted by COVID-19. It began again in the fall of 2020 but then stopped again in January 2021 because of COVID-19.

[20] Currently, G.J. is seeking employment in [Yukon community]. Specifically there are positions available at [name of employer]. G.J. says there is a good daycare, which includes cultural and spiritual teaching in [Yukon community] for A. if she is in his care while he is working. G.J. has applied for housing through Champagne-Aishihik First Nation and is on a waiting list for transition housing. Right now, he is living in a motel in [Yukon community].

[21] G.J. has had one known relapse. In November 2020, at a bar in [Yukon community], he drank alcohol after 13 months of sobriety. He was charged with a breach of condition. A. was not with him at that time.

[22] The evidence from the grandparents and G.J. show an increasingly strong bond between him and A. When A. is with him, they spend most of the day with his grandparents. They spend time outside learning about the bush, plants, and animals. She is learning the Southern Tutchone language from his grandmother. They have visited with extended family in [Yukon community], including aunts, uncles, and cousins.

G.J. has bought clothing, books, stuffed animals, and toys (including a rocking horse) for A. He bathes and feeds her every night when she is with him. M.J.J., the grandmother, observes that A. shows significant separation anxiety when she has to leave her father.

[23] C.M. has concerns about G.J.'s ability to care for A. She is concerned he is still using drugs from the text messages she has received recently, which she says are consistent with the aggressive texts he sent when he was using drugs. She also fears for her own safety still because of G.J.'s frequent phone calls to her, which she describes as harassing, and because of his assaults on her in 2019.

[24] C.M.'s reasons for wanting to relocate to Nanaimo are: first, her sole financial support for A. is from her parents in Nanaimo; second, all of her family (her parents, two sisters, three brothers, and extended family) is in Nanaimo, she has no family support in Whitehorse, and her family want to build a relationship with A.; third, it is important for A. to learn about West Indian culture and heritage from her grandmother; and fourth, G.J. has not been involved in A.'s care except for short durations and he is not a capable or appropriate parent because of his substance use and other issues.

Law

[25] The legal principle that applies, both to relocation and to custody determination, is what is in the child's best interests.

Relocation

[26] The applicable leading case is still *Gordon v. Goertz*, [1996] 2 S.C.R. 27, a 1996 decision of the Supreme Court of Canada. It was decided in the context of a variation of a custody order under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), neither of which

exists here. The *Divorce Act* provisions have been amended as of March 1, 2021, so that *Gordon v. Goertz* is no longer applicable in a divorce proceeding, but because these parents were not married the *Divorce Act* does not apply and the principles that were set out by the Court in *Gordon v. Goertz* are still applicable here. In addition, the "best interests", as defined in the *Children's Law Act*, R.S.Y., 2002, c. 31, is also relevant. The relevant factors summarized by the Supreme Court of Canada in *Gordon v. Goertz* are as follows.

[27] First, the only issue is what is in the best interests of the child having regard to all the relevant circumstances relating to the child's needs and the respective abilities of the parents to satisfy them.

[28] Second, each case turns on its own unique circumstances.

[29] Third, the rights and interests of the parents, except as they impact the best interests of the child, are irrelevant.

[30] Fourth, the Court should consider:

i. the existing custodial arrangement;

ii. the relationship between the child and the custodial parent;

iii. the existing access arrangement;

iv. the relationship between the child and the access parent;

v. the desirability of maximizing contact between the child and both parents;

vi. the moving 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;

vii. the disruption to the child resulting from a change in custody; and

viii. the disruption to the child resulting from his or her removal from family, schools, and community.

[31] The views of the parent who has primary care of the child are to be respected but there is no legal presumption in favour of that parent.

Custody and Access

[32] The factors to be considered in determining the best interests of the child for custody and access purposes are set out in the *Children's Law Act* and are also relevant here. They include a consideration of:

> 30(1) ... all the needs and circumstances of the child including
>
> (a) the bonding, love, affection and emotional ties between the child and
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons, including grandparents involved in the care and upbringing of the child;
>
> ...

[33] Also relevant are ss. 30(2) and (3), and they say:

> (2) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to have the care or custody of a child.
>
> (3) There is no presumption of law or fact that the best interests of a child are, solely because of the age or the sex of the child, best served by placing the child in the care or custody of a female person rather than a male person or of a male person rather than a female person.

Analysis

Relocation

[34] There is no custody order in place here, as I have said, but it is clear that the primary residence of A. has been with the mother. C.M.'s views therefore are entitled to respect, but there is no presumption in her favour simply because she is the primary care parent. Similarly, there is no formal access order in place for G.J. The situation in fact, though, has been that G.J. has been exercising access approximately two times a month.

[35] I have concerns with the evidence and the absence of evidence from C.M.

[36] First, I acknowledge that her fears of G.J., because of the past assaults and his substance use, provide good reason for their separation and ongoing failure to reconcile. I do not want to diminish these occurrences and the effect that they may have had on her, but my focus must be on the best interests of A. presently and in the future.

[37] I remain troubled by C.M.'s approach to her proposed relocation, which was to make plans to move to Nanaimo despite G.J.'s stated and known disagreement, including buying a plane ticket, swearing in an affidavit and telling the Court that she had nowhere to live in Whitehorse after October 1st because her father had already rented out her trailer to someone else, and swearing that her mother had put a deposit down for a new apartment in Nanaimo. This required G.J. to bring an emergency application to court to stop her move (that he found out about through Facebook) until a full hearing with evidence could be held.

[38] It is possible that C.M. was given poor information or advice, as she was unrepresented at the time and said that she was getting help from Family Law

Information Centre. But this approach, in the face of G.J.'s disagreement, showed a lack of respect of his role as a parent. It put C.M.'s own desires ahead of a consideration of the best interests of A., who has a father and significant extended family in the Yukon.

[39] I also note that C.M. is still living in the same trailer that she said had been rented out to other tenants as of October 1st.

[40] C.M.'s reasons for wanting to relocate are tied to the existence of all her family support, emotional and financial, in Nanaimo and to the facts that she will have more help with childcare and parental mentorship, and that A. will know her mother's side of the family.

[41] C.M. was born and raised in Whitehorse. There was no explanation of why she did not move with her parents and siblings when they moved to Nanaimo in 2016. Although counsel offered that it was because she and G.J. were in a relationship at that time, C.M.'s affidavit evidence is that their relationship did not begin until February 2017. It is unclear to me why C.M. chose to stay in Whitehorse, apparently with her parents' agreement at age 17, without family support.

[42] I recognize that family support to a parent when a parent is raising a child is very helpful, but the question I need to decide is whether A. will benefit most by a relocation to Nanaimo.

[43] I am concerned by the absence of evidence in this case on this issue. There are no affidavits from any of C.M.'s family members. There is a reference in one paragraph of C.M.'s Affidavit #2 of her estimate of approximately 10 visits between her parents or other family members and her since A. was born, either here or in Nanaimo. I recognize that the COVID-19 pandemic restrictions have affected the number of possible visits

over the past year. But no other details were provided about these approximately 10 visits, such as which members of the family visited, when, for how long, what activities they did, whether there was bonding with A., what is the nature of the relationship between C.M.'s family and A. There is no reference to other communication between C.M.'s family and A. either by FaceTime, phone, or otherwise.

[44] There is one support letter attached to Affidavit #2 of C.M. that she says is from her mother, but it is not addressed to anyone, it is typewritten, there is no author's name, and it is not signed. It refers to a place in a Montessori school that has been secured by the mother for A. — the mother teaches at the Montessori school — and it confirms that they will provide financial and emotional support to C.M. It refers to the importance of A. learning about her cultural West Indian teachings and traditions to contribute to her self-esteem and that C.M. will have help with childcare. This is all predicated on her move to Nanaimo.

[45] While all of this may be true, the fact that it is not in affidavit form and it lacks many details, some of which I have mentioned here, means that the weight I place on it is reduced.

[46] There is also no evidence of C.M.'s relationship with A. I have no sense about A. as a child and about her relationship with her mother.

[47] There is no current evidence of C.M.'s plan after her proposed relocation. There is no evidence of her employment, a place to live, or with whom she will live. There was evidence of her employment applications and the fact that a security deposit had been made on an apartment in the September affidavit but no updates have been provided to this in the March affidavit.

[48] There is no evidence about plans to keep A. involved in her father's life, except to say rather vaguely through counsel or in an affidavit that he could come to visit on holidays and could have FaceTime calls. But there is no reference to any plan to keep the grandparents involved in A.'s life. Since A.'s birth, they have had a significant role in her life and in C.M.'s life as support both for childcare and child development. In fact, the evidence, particularly over the last six months, again shows a lack of respect for the grandparents' involvement in A.'s life by C.M. refusing to answer their calls and texts, by making access visits difficult, and attempting to minimize contact. This behaviour does not show a recognition that A.'s family consists of two parents and their extended family, and does not demonstrate a commitment to maintain A.'s paternal relatives in her life.

[49] I also have concerns about C.M.'s new partner, W.W., who has written disparaging, hurtful, and racist texts to G.J. about his inability to fulfill his role as a father to A. It is again not clear from the evidence where W.W. resides but there is some suggestion that he flew to Whitehorse from British Columbia. C.M., in her affidavit, is somewhat dismissive of those texts, saying they have no relation to her and her child care responsibilities. This, in my view, shows a lack of insight because by making racist comments, W.W. is, in effect, insulting A.

[50] I have also considered C.M.'s reasons for moving. The Court in *Gordon v. Goertz* stated that this is a factor to be considered only in the exceptional case where it is relevant to the parent's ability to meet the child's needs. C.M. has indicated that her family provides financial support for A. Without at all diminishing the importance of this contribution, I observe that this financial support can continue regardless of the location of A.

[51] I also note that post-COVID-19 restrictions, travel will be much easier and visits between C.M. and her extended family can resume. And while ongoing emotional support of family members to the mother may be helpful for the child, it is but one factor to be balanced against all of the other factors to be considered.

[52] On the other hand, G.J. has had his own troubles with controlling his temper, with violent behaviour, and with alcohol and drug use. This past behaviour is a concern. However, apart from one relapse in November 2020, G.J. appears to have accepted responsibility for his troubles since October 2019. He appears to be on a healing path shown by his ongoing treatment programs and participation in Community Wellness Court.

[53] On the evidence from him and his grandparents, he is making A. a priority and has developed a strong bond with her even in the relatively short time he has had access to her. The behaviour he manifested during the height of his conflict with C.M. does not appear to have any effect in his relationship with A. The evidence from the grandparents, who are very involved in every visit with A. and G.J., is that she enjoys spending time with him, that he is caring and responsible with her, and that he is learning parenting skills.

[54] The desirability of maximizing contact between the child and both parents is important in assessing the best interests of the child. Section 30(1)(a)(iii) of the *Children's Law Act* also refers to:

> 30(1) ...
>
> (a) the bonding, love, affection and emotional ties between the child and
>
> ...

> (iii) persons, including grandparents involved in the care and upbringing of the child;

[55] A.'s large extended family on her father's side is an important part of her development. Their focus on traditional teachings and culture has already become a part of A.'s life. The J. family has also said unequivocally in their affidavits that A. needs both parents, and that she needs to learn about her West Indian heritage and culture. They recognize that A.'s best interests are served by the love, support, guidance, and teachings of both sides of the family.

[56] Unfortunately, the evidence from C.M. and her family do not give me the same confidence that they appreciate the importance for A. of knowing her Indigenous family and culture. A. is now a citizen of Champagne-Aishihik First Nation and, to her credit, C.M. did want this to occur. However, C.M. provided no plan to facilitate access to G.J. and his family, except in the most general of terms.

[57] There does not seem to be any regard by C.M. for the importance of maintaining and developing this part of A.'s identity. Although she is only just over two and a half, she has an established community here and to remove her even at this stage would be disruptive. It would disrupt the amount of time that she has with G.J. and his family, and it would be a disruption for her to leave the community she has come to know.

[58] The application for an order permitting relocation is denied.

[59] This is, of course, not to discourage C.M. from maintaining and increasing the relationship between A. and C.M.'s side of the family.

Custody

[60] Each parent seeks sole custody. As I said earlier, G.J., in the alternative, asks for joint custody.

[61] Both have expressed concerns about the other's ability to parent. C.M. remains concerned about G.J.'s substance use and his temper, and his lack of parenting skills. G.J. is concerned about the friends C.M. has, who may be involved in drugs and alcohol, and whether she has a sober household. This, I have to say, is speculative as there is only circumstantial and hearsay evidence before me at this point.

[62] I recognize that G.J. has a criminal record, that he has substance use issues, and that he lacks experience in caregiving. But I also recognize s. 30(2) of the *Children's Law Act*, which says that past conduct is not relevant to a determination of custody or access unless the conduct is relevant to the ability of the person to have the care or custody of the child.

[63] As I have observed earlier, G.J. appears to have committed to a new path of healing. He denies using drugs and has relapsed with alcohol only once since October 2019. He appears highly motivated to be a positive part of A.'s life. With the support of his grandparents and his community, Champagne-Aishihik First Nation, he is showing a sense of responsibility for and a commitment to parenting A.

[64] It is unusual to consider joint custody where there is a no contact order in place between the parents. In my view, the no contact order will have to be amended to allow for communication between G.J. and C.M. for the purpose of raising A. in order for joint custody to occur. Once that occurs, in my view, given the caring demonstrated by G.J. and his grandparents, it is in A.'s best interests to be in the joint custodial relationship with both parents. Decision-making shall be joint. And this is, as I said, once the no contact order is amended so that G.C. and C.M. can communicate for the purposes of discussing A.

[65] Primary residence shall remain with C.M. Access by G.J. shall be four days every second weekend from now until G.J. obtains proper housing. Once he obtains proper housing — and that is proper to the satisfaction of C.M. — A. shall spend one week with him and one week with C.M.

[66] There will also be a condition that both parents shall abstain from non-prescription drugs and alcohol 24 hours before or during any time when A. is in their care.

Child support and related issues, travel, and counterclaim costs

[67] Child support is a legal obligation. G.J. is ordered to pay arrears of support starting from September 23, 2020, when notice of the support request was first made, calculated according to the *Child Support Guidelines* based on his 2020 income. This will continue until the one week on/one week off begins. No support will be required thereafter.

[68] Section 7 expenses will be split proportionately after submission to any benefit plans that are in place for either party and after submission to the Champagne-Aishihik First Nation.

[69] Financial statements shall be exchanged yearly by June 1st.

[70] Travel with A. by either parent will be only on consent of the other parent.

[71] There will be no costs of the counterclaim because it did consist of more than a request for support. The request for reimbursement is denied.

Conclusion

[72] In the end, before I address any questions from counsel, I want to make reference to, I think, very appropriate and wise words written by M.J.J. in the last paragraph of her Affidavit #1, on the record. What she said was this:

> All in all, I want to say this. I wish both parents success in their future. We will soon get past this, my hope and dreams for [A.] is that she becomes a healthy young woman who has had the opportunity to know and learn who she is without prejudice. It is not our place to hinder that, but ours to provide the opportunities for her to grow and thrive safely in an environment where she has been provided all the necessary supports to become who she is meant to be.

[73] Thank you for those very wise words. They are very appropriate in this case.

[74] Counsel, do you have any questions or clarifications?

[75] MS. MOONEY: I do, Your Honour.

[76] One, I think that it might be helpful that for the period of time where we're doing the four-day schedule that we actually include that the pick-up and drop-off would be between 4 and 5 p.m. because I think that just clarifies that.

[77] THE COURT: We can add that.

[78] MS. MOONEY: The other — I hope I never need to come back to court but I am a little bit concerned about C.M. being the one that decides whether the housing is adequate and also that that's tied into child support. What I would seek, I guess, is that — the fact that — if she didn't agree, that it would be — that housing would be a change of circumstances, so that if I needed to come back to court, I would be able to. I mean, maybe that doesn't even need clarification but that's just a concern I have.

[79] THE COURT: Because it is joint custody, she should have the ability to be involved in that decision, so I am not going to change that. But I agree that if there is disagreement that you may bring an application to have that determined.

[80] MS. MOONEY: And I'm very — I hope we don't ever have to do that.

[81] THE COURT: I hope so, too.

[82] Thank you very much.

[83] Good luck to you.

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DUNCAN C.J.