# SUPREME COURT OF YUKON

Citation: *P.D.N. v. S.L.N.*, 2022 YKSC 19

Date: 20220331
S.C. No. 17-D5019
Registry: Whitehorse

BETWEEN

P.D.N.

Plaintiff

AND

S.L.N.

Defendant

Before Justice K. Wenckebach

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| Counsel for the Plaintiff | André Roothman (by videoconference) |
| Counsel for the Defendant | Sean LaPrairie |
| Counsel for the Children | Lenore Morris (by telephone) |

This decision was delivered in the form or Oral Reasons on March 31, 2022. The Reasons have since been edited for transcription without changing the substance.

## REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The matter before me is an application in a divorce proceeding.

[2] The facts are that the plaintiff, P.D.N., and the defendant, S.L.N., were married on August 23, 2010, and separated in April 2017. They have three children of the marriage: E.K.R.N.; A.N.W.N.; and A.C.C.N ("the Children").

[3] On January 18, 2018, the plaintiff filed a statement of claim in this matter in the Supreme Court of Yukon.

[4] In June 2020, the defendant moved with the children to Ontario.

[5] On July 9, 2021, the defendant filed an application in this court for parenting time, child support, and other relief.

[6] Then, on November 2, 2021, she filed an application to transfer the proceedings to Ontario pursuant to s. 6 of the *Divorce Act*, R.S.C., 1985, c. 3 ("*Divorce Act*").

[7] The plaintiff opposes the application to transfer the proceedings.

[8] A child lawyer was appointed. She also opposes the application to transfer the proceedings.

[9] What is before me today, then, is whether the application for parenting time and child support should be heard in the Supreme Court of Yukon or it would be better heard in Ontario. My decision turns on what is in the best interests of the children.

[10] With regards to the analysis, s. 6(1) of the *Divorce Act* states:

> If an application for an order under section 16.1 is made in a divorce proceeding or corollary relief proceeding to a court in a province and the child of the marriage in respect of whom the order is sought is habitually resident in another province, the court may, on application by a spouse or on its own motion, transfer the proceeding to a court in that other province.

[11] Thus, under s. 6(1) of the *Divorce Act*, the Court may transfer a proceeding to the province in which the children of the marriage are habitually resident. It is therefore a precondition that the children be habitually resident in the province before the Court may order the transfer.

[12] If the children are habitually resident in the other province, the Court will then determine if it is in the children's best interests to transfer the proceedings. This is found at *Agnew v Violo*, 2013 ONSC 4430 ("*Agnew*") at paras. 3-4.

[13] The factors used to determine the children's best interests include:

- whether the children were wrongfully removed from the first jurisdiction; the parties' compliance with interim orders;
- the jurisdiction in which evidence addressing the issues is readily available; and
- the jurisdiction in which the issues in the application can be most easily and cheaply determined (*Agnew* at para. 10).

[14] I will address each factor in turn.

[15] With regards to wrongful removal, the plaintiff's counsel states that the defendant wrongfully removed the children from the Yukon. The defendant's counsel says that she made the decision to move in the best interests of the children.

[16] The facts leading up to the defendant's move go back to the summer of 2019. The defendant says that, on or about August 16, 2019, the children disclosed to her that the plaintiff had physically assaulted them. She spoke with the RCMP and the plaintiff was charged with assault against at least one of the children. A trial was held in June 2020. The defendant, E.K.R.N., and A.N.W.N. testified. The plaintiff was acquitted.

[17] After the plaintiff's acquittal, the defendant moved from Whitehorse, Yukon, to Atikokan, Ontario, with the children without seeking the plaintiff's consent or providing notice to him. Both the plaintiff and the defendant have family in Atikokan. The plaintiff's father, who lives in Atikokan, learned that the defendant had moved there and told the plaintiff.

[18] The plaintiff did not contact the defendant until April 2021. At that point, his lawyer contacted the defendant and asked to discuss issues relating to decision making and contact. The defendant says she never received the letter.

[19] The defendant, for her part, commenced her application for decision making and child support on July 9, 2021.

[20] The plaintiff's counsel submits that the defendant influenced the children to say that the plaintiff physically assaulted them and that she sought to alienate the children from the plaintiff. She also wrongfully removed the children from Yukon.

[21] The defendant's counsel says that the defendant is not seeking to alienate the children from the plaintiff, but they do not want contact with the plaintiff. She argues that, as the plaintiff only contacted the defendant in April 2021, he acquiesced in her decision to move with the children to Atikokan.

[22] In my opinion, the defendant should not have acted unilaterally when she decided to move to Ontario. She should have obtained the plaintiff's consent or a court order. The Court does not condone acts of self-help such as these. However, the evidence before me does not show that the defendant has been intentionally alienating the children from the plaintiff.

[23] Moreover, the plaintiff has acquiesced to the move. The fact is that the plaintiff has not contested the defendant's move nor is he applying to have the children returned to the Yukon. He may be unhappy about the move and may wish the children still lived in the Yukon, but what he is seeking is to have contact with them, not that the children reside here. This constitutes acquiescence.

[24] With regards to compliance with interim orders, the plaintiff's counsel submits that the defendant has impeded the plaintiff's contact with his children after they agreed

that he could have a visit over video with A.C.C.N. Thus, the defendant missed the first visit that had been arranged and the second visit did not take place by video.

[25] It is important for the plaintiff to be able to have contact with A.C.C.N. and I do find it worrying that the defendant missed the first visit. I hope and expect that the defendant will take the visits seriously and there will be no more issues with regards to the plaintiff's contact with A.C.C.N. and with E.K.R.N. and A.N.W.N., should they want it.

[26] However, these issues are insufficient to warrant factoring them into my decision about transferring the proceedings.

[27] In terms of the best evidence, the defendant's counsel says that the children are well-established in Atikokan and the evidence about their circumstances from school, relatives, and counsellors is all in Atikokan. As this evidence is in Ontario, the matter should be heard in Ontario.

[28] In my view, one of the questions to be determined at the hearing, and perhaps the main issue, is whether the plaintiff's relationship with the children while they were living in the Yukon was healthy or unhealthy, as this could help determine whether the plaintiff should have contact with the children; and if so, what kind of contact.

[29] Evidence on this information from third parties would likely come from the Yukon. This could include, for instance, the records from Child and Family Services or information from the criminal proceedings. The best information on that question, aside from the direct evidence from the parties, then, would therefore be located in the Yukon and not in Ontario.

[30] In addition, there is no information before me that evidence from the school or counsellors in Atikokan would be pertinent to the issues before the Court. I therefore conclude that the best evidence is most readily available in the Yukon.

[31] There is also the question of speed and efficiency. Both the plaintiff's lawyer and the children's lawyer argued that the matter should be heard in the Yukon because it would be heard more quickly and more cheaply here.

[32] I agree with their submissions. This is the decisive factor in my decision.

[33] The parties have retained counsel who can proceed on the application in the Yukon. They have filed affidavits that have discussed to some extent the merits of the application. They and the children's lawyer have familiarity with the facts and the issues. The application can proceed to hearing quickly.

[34] The defendant's counsel says that the defendant would be able to retain counsel in Ontario and that a lawyer for the children could also be appointed.

[35] However, while the defendant and the children will have counsel in Ontario, there is no evidence about how long it would take to retain counsel or when materials could be filed or heard in court. Moreover, the plaintiff would also have to retain counsel, which could take time.

[36] The plaintiff had no contact with his children for approximately one and a half years. If it is determined that it is in the children's best interests to have contact, then it is important that a solid schedule for contact be put in place, especially because of concerns raised that, wittingly or unwittingly, the defendant has encouraged the children to distance themselves from the plaintiff.

[37] I also take into consideration the extra expense that would be required if the matter were transferred to Ontario at this point.

[38] Given the steps that have already been taken in the defendant's application, there would be considerable duplication if the matter proceeds in Ontario. New counsel would need to inform themselves of the case and documents would need to be prepared and filed. The plaintiff is paying for counsel and he should not be required to incur extra costs unnecessarily.

[39] In addition, although the defendant's lawyer and the child lawyer have not been privately retained, there still is a cost to their work which would be for naught if the matter is transferred to Ontario.

[40] Finally, the child lawyer has already met with the children and discussed the issues with them. I do not believe that it is in their best interests to require them to meet with a new person to discuss matters that are potentially traumatic. Rather, their interests are best served by continuing to work with the lawyer they have presently. The best evidence is available in the Yukon, and speed and efficiency favours hearing the matter in this court.

[41] While the proceedings should eventually be transferred to Ontario, I conclude that jurisdiction should stay in the Yukon at least for the defendant's substantive application to be heard and decided. I therefore deny the defendant's application to transfer the proceedings to Ontario.

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WENCKEBACH J.