SUPREME COURT OF YUKON

Citation: *B.B.B. v K.L.M.*, 2022 YKSC 60

Date: 20221110
S.C. No. 14-D4718
Registry: Whitehorse

BETWEEN:

B.B.B.

PLAINTIFF

AND

K.L.M.

DEFENDANT

Before Justice K. Wenckebach

Appearing on his own behalf	B.B.B.
Appearing on her own behalf	K.L.M. (by telephone)
Counsel for the Children	Lenore Morris

This decision was delivered in the form of Oral Reasons on November 10, 2022. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): This application is about a challenging issue in family law: whether a parent can relocate with their children to another jurisdiction. The stakes are high for both parties. For the parent who wants to leave, the decision is frequently made because there are opportunities for both the parent and child elsewhere. For the

parent opposing the relocation, the move can result in drastically reduced opportunities for the parent to be with the child. The court's determination has a profound effect on all members of the family.

[2] In the case at bar, this is what the parties are facing. The defendant K.L.M. wants to live in Ontario with the children of the marriage, E.B.M.-B, born [redacted]; and M.B.M.-B., [redacted]. The plaintiff B.B.B. wants the children to continue to live in Whitehorse.

[3] My decision today is about where the children will live.

[4] As the parties were married, the *Divorce Act*, R.S.C., 1985, c. 3 ("*Divorce Act*") applies. Under the *Divorce Act*, I must only consider the best interests of the children when deciding where the children will live.

[5] Section 16(3) of the *Divorce Act* sets out general factors for determining the best interests of the children. Section 16.92(1) provides additional factors that help in deciding the best interests of the children where one parent proposes to relocate. As there is some overlap between s. 16(3) and s. 16.92(1) factors, I will consider them together.

[6] The factors applicable to the case at bar are:

- the history of the care of the children;
- the nature and strength of the relationship to the parents;
- the reasons for the relocation;
- the impact on the children;
- the children's preferences;

- the willingness of the parties to foster the children's relationship with the other party;
- the parties' abilities to communicate and cooperate with each other; and
- whether the parties complied with the notice requirements for the move.

[7] First, I will look at the history of the care of the children. The parties married in 1998. They separated and reconciled, and their final separation was in 2015. At the time, they were living in Whitehorse. K.L.M., with B.B.B.'s consent, moved with the children to an area in Ontario where she has family. K.L.M. moved back to Whitehorse with the children in 2020. The children spent time with B.B.B., and B.B.B. would have liked to have had a shared parenting schedule with them but K.L.M. had primary parenting time. K.L.M. has been the primary caregiver for the children since at least 2015.

[8] With regard to the nature and strength of the parties' relationship with the children, the children have previously expressed that they feel comfortable and safe with K.L.M. B.B.B. loves the children very much and they also love him. The parties have settled into a schedule with the children and B.B.B. spends as much time as he can with them. B.B.B. understandably expressed his concern about what he and the children will lose if they live in Ontario.

[9] Turning to the reasons for the relocation, there are two primary reasons K.L.M. has identified for the relocation. The first is that it has been very hard to maintain affordable housing in Whitehorse. K.L.M. has had to move three times since she moved to Whitehorse with the children. The rental market is very tight in Whitehorse and expensive. The second reason K.L.M. gives is that she has family support in Ontario.

When she lived there before she was able to get assistance from family in caring for the children. She does not have that in Whitehorse to the extent that she does in Ontario.

[10] K.L.M. gave the example of when she suffered an injury. B.B.B. was unable to care for the children and she had difficulty juggling the tasks of caring for the children and caring for herself. In Ontario, she has others she can turn to.

[11] Both parties also discussed school supports for the children. On this issue, I conclude that both jurisdictions provide similar kinds of services and are not at issue.

[12] The reasons for K.L.M.'s move benefit not only her but also benefit the children. In terms of the impact on the children, the children spent five years in Ontario before moving to Whitehorse. They developed friendships and bonds with family. They are moving back to a familiar environment.

[13] With regard to the children's preferences, a Child Lawyer spoke with the children and they expressed a clear preference for living in Ontario. For better or worse, they moved to Whitehorse during the middle of the pandemic and that may have coloured their experience of Whitehorse. Regardless of why, they wish to be in Ontario.

[14] With regard to the willingness of the parties to foster the children's relationship with the other party, in court, K.L.M. said she would ensure that B.B.B. would have extensive parenting time with the children and was flexible about making arrangements for B.B.B. to see the children.

[15] The one issue that gives me pause is that the Child Lawyer said that the children blame B.B.B. for opposing the move. I do not know what the parties have said to the children and therefore do not know how they know B.B.B. is against the move. I will say this: it is very important that the children not be exposed to their parents' conflict, as that

can impact the relationship with one or both of the parties. Where the parties disagree on an issue, the message from both parents should be that they will work things out and that they both love and want what is best for the children. I hope that K.L.M. will communicate this message to the children and help them understand that there is no reason to be angry with B.B.B.

[16] This leads me to the parties' abilities to communicate and cooperate with each other. The emails that were attached as exhibits to the affidavits show that the parties are able to speak to one another and cooperate. Again, however, I do have some concerns about how communication will occur if K.L.M. lives in Ontario with the children. In particular, B.B.B. attests that K.L.M. made decisions for the children, such as changing schools, without consulting B.B.B. The parties have joint custody and K.L.M. is required to speak with B.B.B. about any major decisions affecting the children. They are supposed to come to these decisions together. If that is not occurring in Whitehorse, when B.B.B. is regularly seeing the children and there are no impediments to communication it is even less likely to occur in Ontario.

[17] Finally, I turn to compliance with the notice requirements. Under s. 16.9(1) of the *Divorce Act*, a parent wishing to relocate with the child must provide notice to the other party. The other parent then may agree or object to the proposed location. Having provided notice of relocation, the parent wishing to relocate is permitted to move if the court authorizes the move, the other parent, having been notified, does not object within 30 days, and there is no order prohibiting the move. This is in accordance with s. 16.91 of the *Divorce Act*.

[18] In this case, K.L.M. provided B.B.B. with the notice of relocation as required. B.B.B. provided an objection to the move. Pursuant to s. 16.91 of the *Divorce Act*, then, K.L.M. was required to seek court approval to relocate. She did not do so but on October 1, 2022, moved with the children to Ontario.

[19] Relocating without a court order is wrong. It not only goes against the legislation but may lead the court to conclude that the parent is trying to undermine the other parent's relationship with the child. It can also be a way to try and create a new status quo so that the court is reluctant to return the child to the home jurisdiction.

[20] In this case, K.L.M. should have known better. She has been involved in court processes before and should have known she was required to apply to court. However, I do not believe that K.L.M. was acting in bad faith when she moved. K.L.M. did provide notice to B.B.B. and the parties attended mediation to try and reach a solution. K.L.M. attests that she would not have a place to live as of October 1. She had a recent injury and it sounds like she was overwhelmed.

[21] While the circumstances are not sufficient to require K.L.M. to return because she left without a court order, her actions once again suggest that she should be more respectful of B.B.B. and his relationship with the children.

[22] In conclusion, it would be better if the children were able to spend as much time as possible with both parents. It seems to me that B.B.B. was in the process of strengthening his relationship with the children before K.L.M. left. However, I can also see that living in Whitehorse was a struggle for K.L.M. and as B.B.B. noted during the hearing, it is questionable how positive the children's living situation would be if K.L.M.

were to live in Whitehorse against her better judgment. Moreover, the children are happy in Ontario.

[23] I am taking K.L.M. at her word that she will facilitate contact between B.B.B. and the children. Joint custody will continue, and I expect K.L.M. to involve B.B.B. in decision-making regarding the children. That will enable B.B.B. to have continued involvement in the children's lives, although I accept that the involvement is not ideal.

[24] On that basis, I am allowing K.L.M. to relocate to Ontario with the children.

[DISCUSSIONS]

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WENCKEBACH J.