IN THE SUPREME COURT OF YUKON

Citation: *T.T.T.M.* v. *E.E.Q.*, 2008 YKSC 37

Date: 20080610
S.C. No. 04-B0004
Registry: Whitehorse

Between:

T.T.T.M.

Plaintiff

And

E.E.Q.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Fia Jampolsky — Counsel for the plaintiff
Shayne Fairman — Counsel for the defendant

REASONS FOR JUDGMENT
(Jurisdiction)

INTRODUCTION

[1] This is a custody case for an 11-year-old child presently in the custody of the father and residing in northern British Columbia near the Yukon border. The mother, who resides in the Yukon near the British Columbia border, applied for and was granted interim custody of the child from April 2004 to December 2006 when the father applied for and was granted interim custody of the child. The mother filed an application for custody in September 2007. The father contests the jurisdiction of this court and applies for a transfer of jurisdiction to the Supreme Court of British Columbia.

ISSUES

[2] There are two issues to address:

1. Did the Supreme Court of Yukon have jurisdiction to make the original order under s. 37 of the *Children's Act*, R.S.Y. 2002, c. 31?
2. If the answer to Issue 1 is yes, should the Supreme Court of Yukon continue to exercise its jurisdiction or should the jurisdiction be transferred to the Supreme Court of British Columbia?

FACTS

[3] The interim applications in this case have proceeded on the basis of affidavit evidence, much of which was in dispute.

[4] The mother and father lived in a common-law relationship from 1998 until their separation in January 2003. Their daughter, the subject of this custody case, was born on April 28, 1998, in Watson Lake, Yukon, and resided there with her parents until the fall of 1999.

[5] The mother was 17 years old at the birth of their daughter and the father was 21. They have known each other since the mother was 11 years old.

[6] Their relationship can best be described as a tumultuous one characterized by physical abuse and excessive alcohol consumption. The mother alleges that the father was violent to her on many occasions and acknowledges that she was occasionally violent in self-defence. The father alleges that the violence was mutual.

[7] The relationship ended in January 2003 because the father allegedly assaulted the mother when she entered into a new relationship.

[8] The father is a member of the Tahltan Nation, whose territory is in the Telegraph Creek – Dease Lake area of northern British Columbia.

[9] The mother is a member of the Liard First Nation, whose territory is in the Watson Lake area of the Yukon. Dease Lake is approximately 250 kilometres from Watson Lake. Cross-border contact between the two First Nations is not unusual. Watson Lake is the larger centre with an approximate population of 1,500 and Dease Lake is smaller with an approximate population of 600.

[10] In the fall of 1999, the mother and father moved to Fort Nelson, in northeastern British Columbia, where they remained until the spring of 2000. They moved further south to Fort St. John where they remained until the fall of 2002 when they moved to Dease Lake. Both parents appear to be employed from time to time in remote camps where they work in camp and then return to their home and so on in rotation.

[11] The family resided in Dease Lake until January 2003 when the parents' relationship ended. The father looked after the child from January to April 2003 in Sparwood, British Columbia, where his mother resided. He returned to Dease Lake and had care of the child from April to September 2003.

[12] In September 2003, the father and mother agreed that the mother would have the care of the child. She had been working in Fort Nelson but returned to Watson Lake with the child in the fall of 2003. The mother had care of the child until December 2003 when she agreed that the father could take the child to Sparwood, British Columbia, for a visit over Christmas on the understanding that he would return the child to the mother in Watson Lake in early January 2004. The father did not return the child to the mother as agreed for reasons which are in considerable dispute.

[13] The mother brought an application for interim custody in this court in April 2004. The father did not have time to file his material and the matter was adjourned to June 8, 2004.

[14] However, this Court granted interim interim joint custody of the child to the mother and father on April 27, 2004, with care and control to the mother until June 8, 2004. The order prohibited the father from removing the child from the Yukon without the written permission of the mother or further order of this court.

[15] The father filed an extensive affidavit on May 20, 2004, acknowledging that he planned to return the child to the mother in Watson Lake in early January 2004, but stating that he changed his mind because he had heard about allegations of physical abuse of the mother by her boyfriend in the presence of the child. The mother filed an affidavit on June 3, 2004, denying the allegations of abuse by her boyfriend. The father's affidavit was prepared by a lawyer but he was not represented by a lawyer in court until December 2006.

[16] The father also raised the issue of jurisdiction in his May 20, 2004 affidavit stating that the child was habitually resident in British Columbia from age 1 to September 2003.

[17] On June 8, 2004, the mother appeared in Whitehorse with counsel and the father was present with the aboriginal court worker acting as his agent.

[18] The court confirmed the interim interim order of April 27, 2004, and adjourned the matter to August 17, 2004, when the father appeared by telephone. The court ordered interim custody of the child to the mother and ordered the father to pay child support of $212 per month commencing July 1, 2004.

[19] There was no further court application until December 15, 2006, when the father retained counsel and applied for interim custody of the child. The father stated that the mother had been living in Dease Lake for the past six months. The mother was arrested on November 29, 2006, on outstanding warrants from the Yukon. He picked up the child, then 8 years old, and kept her in his care. The mother did not respond to this application and the court ordered interim custody to the father and prohibited the mother from removing the child from Dease Lake, British Columbia, without the express written consent of the father or an order of the court. This order was recognized by an order dated January 29, 2007, in the Terrace Registry of the Provincial Court of British Columbia.

[20] The mother filed an application for interim custody of the child on September 19, 2007, but did not file a supporting affidavit until March 3, 2008. She acknowledged her arrest on November 29, 2006, in Dease Lake, on the outstanding warrants. She stated that she spent three days in custody in Whitehorse.

[21] The mother also stated that she was not aware the matter would be heard on December 15, 2006. She stated that she had been attempting to retain a legal aid lawyer since January 2007, although she acknowledged missing two meetings with her lawyer.

[22] The father filed an extensive response affidavit and has made a preliminary application to have this file transferred to the Supreme Court of British Columbia. To that end, the father filed a writ of summons in the Smithers Registry of the Supreme Court of British Columbia on May 1, 2008. Counsel for the father proposes that the affidavits and court orders from this Court be admitted in the British Columbia

proceeding to maintain continuity. Counsel for the mother submits that the Yukon remains the most appropriate jurisdiction to hear the mother's application. Both counsel are of the view that the custody issue must go to trial with oral evidence.

The 2004 jurisdiction issue

[23] The first issue to address is whether this court had jurisdiction to make any of the orders since April 2004.

[24] The prerequisites for a custody order are set out in s. 37 of the *Children's Act*, R.S.Y. 2002, c. 31.

> 37(1) The court shall only exercise its jurisdiction to make an order for custody of or access to a child if
>
> (a) the child is habitually resident in the Yukon at the commencement of the application for the order; or
>
> (b) although the child is not habitually resident in the Yukon, the court is satisfied that
>
> (i) the child is physically present in the Yukon at the commencement of the application for the order,
>
> (ii) substantial evidence concerning the best interests of the child is available in the Yukon,
>
> (iii) no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> (iv) no extra-provincial order in respect of custody of or access to the child has been recognized by a court in the Yukon,
>
> (v) the child has a real and substantial connection with the Yukon, and
>
> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Yukon.
>
> (2) A child is habitually resident in the place where the child resided
>
> (a) with both parents;

> (b) if the parents are living separate and apart, with one parent under an agreement or with the consent, the implied consent or the acquiescence of the other, or under a court order; or
>
> (c) with a person other than a parent on a permanent basis for a significant period of time,
>
> whichever last occurred.
>
> (3) The removal or withholding of a child without the consent of the person having care and custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process for the return of the child by the person from whom the child is removed or withheld.

[25] There are three circumstances where a court may exercise jurisdiction to make a custody or access order:

1. where the child is habitually resident in the Yukon at the commencement of the application;
2. where the child is not habitually resident in the Yukon but the child is physically present in the Yukon and the court is satisfied that certain additional criteria have been met;
3. where the child is habitually resident in the Yukon but is not physically present at the time of the application because the child has been removed without the consent of the person having the care and custody of the child.

[26] The purpose for setting out specific principles for the exercise of jurisdiction in custody or access matters for a child is found in s. 29(b) of the *Children's Act*:

> The purposes of this Part are to
>
> …
>
> (b) recognize that the concurrent exercise of jurisdiction by judicial tribunals of more than one province, territory or state in respect of the custody of the same child ought to be avoided, and to make provision so that the court will, unless

> there are exceptional circumstances, decline or refrain from exercising jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place with which the child has a closer connection;

[27] In addition, s. 39 states that even where the court determines that it has jurisdiction, it may decline to do so if it is more appropriate for jurisdiction to be exercised outside the Yukon.

[28] Section 39 states:

> 39 In an application under this Part in respect of custody or access to a child, the court may decline to exercise its jurisdiction if it is of the opinion that it is more appropriate for jurisdiction to be exercised outside the Yukon.

[29] In addition to the "exceptional circumstances" exercise of jurisdiction, there is also the *parens patriae* jurisdiction of a court which can be exercised where a child is not present in the jurisdiction and there is no statutory basis to take jurisdiction. The classic case for the application of this principle is *Yassin* v. *Loubani*, 2006 BCCA 509, where the court awarded interim custody to a mother for her two children who were residing in Saudi Arabia at the time. The mother, father and the two children were all Canadian citizens and habitually resident in Saudi Arabia. The British Columbia Court of Appeal confirmed the *parens patriae* jurisdiction of the court to take jurisdiction over Canadian citizens, particularly as Saudi Arabia did not recognize the equality of men and women.

[30] *Yassin* v. *Loubani* was subsequently applied in *Arsenault* v. *Burke*, 2007 BCSC 23, a case that probably has more facts in common with the case at bar. In *Arsenault*, the two subject children had just moved to British Columbia with their paternal grandparents when their mother had applied for custody in New Brunswick. The New

Brunswick court assumed jurisdiction and issued an *ex parte* interim custody order. This was brought to British Columbia, but the grandparents secured an interim interim order granting them custody on an emergency basis. The court's jurisdiction to make this order was questioned by the mother on the basis that it was not justified under the British Columbia *Family Relations Act* ("*FRA*") which has terms equivalent to the ones at issue here. Garson J. upheld the Master's interim custody order, writing that even though the court did not have jurisdiction under the *FRA*, it could act in a *parens patriae* capacity. His decision to find jurisdiction under these circumstances came after considering both the administration of justice and the welfare of the children. Critical here was a finding that there was substantial evidence available in British Columbia concerning the best interests of the children and that it was well-equipped as a forum to hear the case.

[31] Although s. 183 of the *Children's Act* retains the inherent jurisdiction of this superior court, I do not think it appropriate to resort to the *parens patriae* jurisdiction in the circumstances of this case. It appears to me that invoking the *parens patriae* jurisdiction should be reserved for unusual cases where the strict statutory requirements would result in an injustice. As stated in s. 29(b), it is only in exceptional circumstances that the principle of deferring to the jurisdiction with the closer connection to the child should not be followed.

Did this Court have jurisdiction to make the original custody order?

[32] Despite the objection to jurisdiction in the father's first affidavit, the question of jurisdiction was not formally contested when this Court made its first interim interim order.

[33] The practice in this Court, to give efficacy to the principle of cost effective access to justice in family law matters, is to proceed to make interim custody orders, which for all practical purposes are treated by the parties as “final” orders, subject to further affidavit applications arising out of a change of circumstances. Contested custody cases in this jurisdiction do not usually proceed to a trial with oral evidence but are decided on an interim order basis.

[34] The facts before the judge provided a clear basis for the assumption of jurisdiction. The affidavits before the court disputed virtually every aspect of the relationship between the parents and their ability to care for the child. The one area of agreement was that the father and mother had the joint care of the child in British Columbia until their separation in January 2003. That would seem to make the habitual residence for the child in British Columbia under s. 37(2)(a).

[35] However, in September 2003, the mother took custody of the child when the father agreed to the mother’s custody of the child in British Columbia. The father presented this as an agreement for the mother to have primary care in Fort Nelson, British Columbia. The mother returned to Watson Lake with the child until December 2003, which I find the father either agreed to or acquiesced in.

[36] The mother then consented to the father taking the child for a Christmas visit to British Columbia. When it came time to return the child, the father alleged that he did not want to return the child because of spousal violence in the mother’s household, an allegation that the mother vehemently disputes.

[37] I conclude that the initial assumption of jurisdiction was based upon s. 37(1)(a), habitual residence in the Yukon, by virtue of an agreement or acquiescence which was then unilaterally breached by the father's removal of the child under s. 37(3).

Should this Court continue to exercise jurisdiction?

[38] In December 2006, this Court granted interim custody to the father in Dease Lake, British Columbia, with a prohibition that the mother should not remove the child from British Columbia. The mother had resided in Dease Lake with the child for six months before the father's application.

[39] Arguably, the question of jurisdiction in child custody dispute could be determined on an application-by-application basis so that a s. 37 interpretation would be required each time an interim order or variation of an interim order is made. In the Yukon, where parents frequently move in and out of the jurisdiction, that could lead to jurisdiction disputes taking precedence over the determination of the child's best interests. In some cases, where a child is removed from the jurisdiction on a temporary basis or by court order, this Court specifically indicates it is retaining jurisdiction to discourage strategic applications to transfer jurisdiction.

[40] Professor Hovius, in his commentary on this provision in the looseleaf *Child Custody Law and Practice*, writes that the determination under the six criteria of s. 37(1)(b):

> … will often turn on rather subjective assessments of whether substantial evidence is available, whether the child has a real and substantial connection to the jurisdiction, and the balance of convenience. In these assessments, the courts should keep in mind the general policy underlying the legislation; namely, that children's custodial arrangements should be dealt with only in the jurisdiction of their habitual residence unless there is a very good reason for the courts

> of another place to assert jurisdiction based on physical presence and balance of convenience. (McLeod J. ed., *Child Custody Law and Practice,* looseleaf (Scarborough: Carswell, 1992) at ch. 7. “Mobility Issues in Custody and Access cases”)

[41] In my view, once a court has taken jurisdiction under s. 37, it is better to approach the question under s. 39 to determine if the court should decline jurisdiction. In other words, is it more appropriate under the statutory principles to decline jurisdiction to another court where the child has a closer connection? This invites a consideration of the factors included under s. 37(1)(b):

a) which jurisdiction has the substantial evidence concerning the best interests of the child;

b) is there an outstanding application before a tribunal in a jurisdiction where the child is habitually resident;

c) is there a custody or access order in another jurisdiction;

d) what tribunal should exercise jurisdiction on the balance of convenience.

[42] In addition, consideration should be given to the fair and proper administration of justice.

[43] There is a creative decision by Vertes J. in *Boros* v. *Boros*, [1998] N.W.T.R. 248, which was not a divorce case. In *Boros*, the child was born in 1990 in British Columbia and resided there with both parents until 1994 when they moved to the Northwest Territories. The father left the Northwest Territories in 1995 to work in Ontario and the parents remained separated. The Northwest Territories court granted interim custody to the mother in 1996 and there were extensive interlocutory proceedings continuing into

1997 when the mother moved back to British Columbia. Prior to the scheduled trial date, the mother applied to transfer the proceedings to British Columbia.

[44] Vertes J. stated at para. 5:

> The child is not physically in this jurisdiction. The mother has established a permanent home in British Columbia, a place to which the mother and child have substantial connections because of family ties. The father is in Ontario. Neither parent has any connection to the Northwest Territories and no intention to return here. The child is enrolled in school in British Columbia.

[45] Vertes J. considered the following principles:

1. the best interests of the child;
2. the fair and proper administration of justice;
3. the reluctance of the court to alter jurisdiction in the face of pending proceedings;
4. the prevention of any attempt by a litigant to manipulate jurisdiction; and
5. the prejudice and cost involved in starting all over in British Columbia.

[46] He determined that British Columbia was the appropriate jurisdiction for the best interests of the child because the child resided there and the mother's witnesses were there as well. The inconvenience to the father was the same, as he would have to travel to British Columbia or to the Northwest Territories from Ontario and he had no connection with either jurisdiction.

[47] Vertes J. had the greatest concern for the fact that it would be extremely prejudicial and costly to start all over in British Columbia. He concluded that the prejudice and cost could be minimized by declining jurisdiction and transferring the proceedings to British Columbia on two conditions to be satisfied in 45 days:

1. that the mother commence proceedings in British Columbia; and
2. that the mother formally acknowledge her agreement to admit all the material filed in the Northwest Territories proceeding to the British Columbia proceeding.

[48] For the case at bar, counsel for the father urges this resolution upon this Court and to that end has commenced proceedings in Smithers, British Columbia, the closest registry of the British Columbia Supreme Court, and approximately 585 kilometres from Dease Lake. He proposes that the jurisdiction be transferred to British Columbia on the condition that the affidavits and orders from this Court be filed in British Columbia.

[49] There are a number of factors favouring British Columbia as the appropriate place for trial. The child has spent most of her life there, probably eight of her 11 years, with approximately two years in Watson Lake (her birth year being one) and one year in Alberta.

[50] Both counsel agree that British Columbia is now the habitual residence of the child, with Dease Lake being her permanent home since at least July 2006. Most of the witnesses with evidence about the child's best interests will be in the Dease Lake area. In terms of holding a trial, which both counsel admit is necessary, the preferred location is Dease Lake.

[51] Three matters give me great concern:

1. both parties have Yukon counsel who are familiar with the file;
2. the mother, who resides in Watson Lake, may be prejudiced if she has to retain a new counsel in British Columbia; and

3. from an administration of justice point of view, this Court has the most experience with the case and can hold the trial in Watson Lake, which is considerably more convenient to the mother and perhaps even the Dease Lake witnesses compared to Smithers, British Columbia.

[52] But for the fact that the father raised the jurisdiction issue at the outset of this custody case and that the mother returned to British Columbia in 2006, I would have some concern that the father was attempting to manipulate the jurisdiction to deprive the mother of her day in court. Unfortunately, that may be the result of a decision to decline jurisdiction and that would be tragic. But I have come to the conclusion that the best jurisdiction to hear this matter is British Columbia because the child is habitually resident there and at the last hearing in this Court, the mother was caring for her there. While the mother's residence may alternate between Dease Lake and Watson Lake, the best interests of this child will be substantially determined by evidence in Dease Lake, rather than Watson Lake. In addition, this Court has no advantage over the Supreme Court of British Columbia to the extent that the matter has been adjudicated on affidavit evidence.

[53] I therefore decline to exercise jurisdiction in this case on the condition that counsel for the father in Smithers, British Columbia, file all the affidavits and orders from this Court in the British Columbia proceeding by way of affidavit to assist that court in adjudicating this custody dispute.

VEALE J.