SUPREME COURT OF YUKON

Citation: *G.N. and Y.N.* v. *D.N. and E.P.*, 2009 YKSC 75

Date: 20091126
S.C. No. 09-B0022
Registry: Whitehorse

Between:

G.N. and Y.N.

Plaintiffs

And

D.N. and E.P.

Defendants

Before: Mr. Justice L.F. Gower

Appearances:

Edward J. Horembala — Counsel for the Plaintiffs
André Roothman — Counsel for the Defendant E.P.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by G.N. and Y.N. (the “grandparents”) for specified unsupervised access to their granddaughter, T., who has just turned five years old. The child’s mother, E.P., is the former daughter-in-law of the grandparents. The child’s biological father, D.N., was in a brief relationship with E.P., but the couple separated when T. was two months old. The father has not seen the mother or the child for over four years. Indeed, he did not appear for this application or any of the related proceedings discussed below.

[2] After the father and mother separated in early 2005, the mother decided to return to college to complete her teaching certification. For approximately the next two years, the mother allowed the grandparents generous access to the child, including several overnight visits each month and an extended two-week holiday in August 2008. The mother says she took advantage of the grandparents' willingness to assist with T.'s care because she was a single parent struggling to raise the child on her own, while concurrently pursuing her post-secondary education and working full time during the summer vacations to support herself and her daughter.

[3] The mother is now employed as a teacher at a Whitehorse elementary school and is also working on her Masters of Education through correspondence. She has been in a relationship with J.W. for the past 19 months and the couple are engaged to be married.

[4] The mother's own parents separated when the mother was very young, and each have since become involved in new relationships. The mother's grandparents on her father's side are also still alive.

[5] While this introduction is somewhat longer than I would ordinarily provide, it is important to understand the complexity and depth of the child's family matrix. Not only does T. have the benefit of a relationship with her paternal grandparents, the applicants in this case, she also has relationships with two sets of maternal grandparents, as well as with her maternal great-grandparents.

ISSUE

[6] The issue in this application is relatively straightforward. Is it in the child's best interests for the applicant grandparents to have specified and unsupervised access? Or,

should the mother, who has custody of T.[1], be entitled to decide when, and under what conditions, she will allow the grandparents access to the child?

LAW

[7] In *Chapman* v. *Chapman*, [1993] B.C.J. No. 316, Brenner J., as he then was, set out the law in British Columbia on the question of non-parental access rights, at para. 24:

> "…In determining the best interests of an infant, such as the four [year] old child in this case, the court must also be mindful of the following:
>
> 1. The onus is on the applicant to demonstrate that the proposed access is in the child's best interests.
>
> 2. The custodial parent has a significant role. The courts should be reluctant to interfere with a custodial parent's decision and should do so only if satisfied that it is in the child's best interests.
>
> 3. It is not in the best interests of a child to be placed into circumstances of real conflict between the custodial parent and a non-parent. While the court must be vigilant to prevent custodial parents from alleging imagined or hypothetical conflicts as a basis for denying access to non-parents, in cases of real conflict and hostility, the child's best interests will rarely, if ever, be well served by granting access." (my emphasis)

That summary of the law was approved by Esson J.A., of the British Columbia Court of Appeal, in *F.(N.)* v. *S.(H.L.)*, 1999 BCCA 398, at para. 8.

[8] In *Parmar* v. *Parmar*, [1997] B.C.J. No. 2094, Master Nitikman, of the British Columbia Supreme Court, reviewed a number of cases on point and derived the following legal principles, at paras. 11 to 19, which I will paraphrase:

[1] Technically, the mother and father have joint custody of T. by a consent order made on March 30, 2006.

1. Grandparents do not have a legal right to custody of or access to their grandchildren. They may, however, have legal standing to apply for custody or access, as they do in the Yukon, under s. 33(1) of the *Children's Act*, R.S.Y. 2002, c. 31.
2. If grandparents are successful in obtaining access, their entitlement is different from the right and entitlement of a parent.
3. In making any order for custody or access, the court is required to make the best interests of the children its paramount concern. In the Yukon, that is legislatively required under s. 29(a) of the *Children's Act*. Further, in determining what is in the best interests of a child in an application for access, the court must consider the needs and circumstances of the child as set out in s. 30(1) of the *Act*.
4. In normal circumstances, it is in the best interests of children to have contact with their grandparents and extended family members.
5. Considerable weight should be given to the wishes of the custodial parent and care should be taken to ensure the court does not interfere unduly with the inherent right of a parent to determine the course of their child's upbringing.
6. Generally speaking, grandparents have to accommodate themselves to the parent's decision regarding the amount and type of access.
7. The child's preference should be noted and given proper consideration based on the child's age. Given that T. has just turned five years old, this is not a consideration here.

8. When the court finds it appropriate to grant specified access, the amount of access allowed is ordinarily quite limited. The example given in *Parmar* was five hours one weekend each month.

[9] In *Parmar*, Master Nitikman was deciding an application by paternal grandparents for specified access to their grandchildren aged seven and five. Although the respondent mother was not opposed to the children seeing their grandparents, she objected to such an order because she wanted access to be at a time when it was convenient for her. Master Nitikman granted an order for reasonable access, including overnight visits, but indicated that the grandparents would have to accommodate themselves to the mother's decisions regarding the amount and type of access. He concluded, at para. 23 that, although the grandparents may not be entirely happy about the amount of access their daughter-in-law was prepared to give them, they were advised to scale down their expectations:

> "… Unless there is a wilful attempt to alienate the children from their grandparents and to frustrate the court order, the court should not attempt to dictate to parents how much time and under what conditions grandparents are to see their grandchildren. Having determined that the best interests of the children are served by access to their grandparents, it is only upon evidence that the custodial parent is acting against those best interests by being unreasonable that the court should specify access." (my emphasis)

[10] In *McLellan* v. *Glidden*, [1996] 177 N.B.R. (2d) 38, Smith J., of the New Brunswick Court of Queen's Bench, reviewed the law on non-parental access and concluded at para. 24:

> "It follows that in determining if it is in the best interests of a child to renew contact with a third party, the court should consider the answers to the following questions before it

> interferes with a custodial person's right to deny access by a child to a third party:
>
> 1) are the concerns expressed by the custodial parent for denying access reasonable;
>
> 2) is the access that is being denied important to the child's well being;
>
> 3) is it possible that the denial of access to the third party may have a long term negative impact on the child; and
>
> 4) will the access to a third party have a negative impact on the custodial person's relationship with the child?" (my emphasis)

[11] In *D.W.M*. v. *J.S.M*., 2003 BCSC 1229, Master Brine, of the British Columbia Supreme Court, said this at para. 20:

> "When ruling on an application for access to a child a court must give paramount consideration to the best interest of that child. However, significant deference must be accorded the custodial parent and their ability to determine the child's best interests. Ordinarily the grandparents of that child are entitled to access at the time and for the duration and under the conditions that the custodial parent may allow. The limits to the court's deference will be reached where the custodial parent is acting willfully against the children's best interests." (my emphasis)

[12] A helpful appellate level decision is found in another case entitled *Chapman* v. *Chapman*, this time from the Ontario Court of Appeal, [2001] O.J. No. 705. There, the parents appealed from a decision awarding the paternal grandmother access for at least 44 hours per year, to be made up of at least six visits. The two grandchildren were aged eight and ten years. In allowing the appeal, Abella J.A., as she then was, delivered the judgment of the Court and made the following comments at para. 19:

> "A relationship with a grandparent can - and ideally should - enhance the emotional well-being of a child. Loving and

> nurturing relationships with members of the extended family can be important for children. When those positive relationships are imperiled arbitrarily, as can happen, for example, in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship [citations omitted].” (my emphasis)

And later, at paras. 22 and 24, Abella J.A. continued that it is the parents’ right to decide the extent and nature of the grandmother’s access in relation to the needs to the children:

> “…The parents have, for the moment, decided that those needs do not include lengthy, frequent visits with their grandmother. Although the parents' conflict with Esther Chapman is unfortunate, there is no evidence that this parental decision is currently detrimental to the children. It should therefore be respected by the court and the children's best interests left in the exclusive care of their parents.”
>
> …
>
> “…This does not mean that the grandmother will be unable to have access; it means that the nature and frequency of the access will be at the discretion of the parents who, it is assumed, will make that determination based on the best interests of the children…” (my emphasis)

[13] As one might expect, there is often a significant amount of animosity between the custodial parent(s) and the grandparent(s) seeking access. The extent to which this should be a factor in determining access was addressed by Finch J.A., as he then was, of the British Columbia Court of Appeal in *G.(M.L.)* v. *G.(K.L.)*, [1993] B.C.J. No. 2012, at paras. 16 and 17:

> “I would observe that in this case no party seeking access is a parent of J.L.G.'s. Acrimony between a custodial parent, and someone seeking access to the child, is a factor to consider when looking at the child's best interests. When the person seeking access is another parent, bad feelings,

> hostility, or personal enmity between the parents would not ordinarily displace the benefit the child would be expected to derive from a continued relationship with both parents.
>
> However, in a case such as this, where those seeking access are not parents, acrimony between the parties may be a more important factor in deciding how the child's best interests are to be served and protected. The more distant the connection between the child and the person seeking access, the more importance I would accord to hostility between the parties as a factor in deciding whether access is in the child's best interests."

ANALYSIS

[14] It appears that, for the most part, the mother and the grandparents got along reasonably well during the period when they were allowed generous access to the child. In March 2006, the mother and father consented to an order (without a hearing) granting them interim joint custody of the child. The order also specified that the child would reside with the father during each two-week period for approximately four days, including overnight stays on each of those occasions. Notwithstanding that consent order, it appears that the father did not actually exercise that access or have anything at all to do with either the mother or the child. On the other hand, the grandparents have deposed that they effectively stood in the father's shoes and used his access time to have their contact with the child.

[15] However, the relationship between the mother and the grandparents started to deteriorate in 2007, with each side accusing the other of becoming more controlling over the time that they were respectively spending with the child. Further, after the mother began her live-in relationship with J.W., he became increasingly close with the child, to the point where she began to call him "Daddy". This apparently did not sit well

with the grandparents and led to a major argument between them and the mother on May 7, 2009, after which the mother terminated access.

[16] On May 25, 2009, the grandparents commenced this action to obtain access to the child and brought the application now before me. At that time they were unrepresented by counsel.

[17] On May 28, 2009, I am told the mother swore a summons in the Territorial Court to obtain peace bonds against each of the grandparents based on her fear that they would cause personal injury or harm to her and the child.

[18] On June 4, 2009, the grandparents appeared in Territorial Court, still self-represented, and entered into peace bonds to have no contact with the mother.

[19] June 9, 2009 was the initial hearing date of the grandparents' access application. At that time, the mother sought an adjournment in order to obtain counsel. She did not consent to any access. The matter was adjourned to June 23, 2009.

[20] On June 18, 2009, the grandparents were summonsed by the mother to Territorial Court a second time and, while still self-represented, entered into new peace bonds for a period of two months, promising to have no contact with either the mother or the child.

[21] By June 23, 2009, the mother had retained a lawyer, but the grandparents were continuing to represent themselves. On that date, without the benefit of full argument, I made what I intended to be an interim, interim order that the grandparents were to have reasonable supervised access to the child, not less than twice a week, for four hours on each occasion, on terms to be agreed in writing between the parties. I also ordered, with

the agreement of the parties, that a judicial settlement conference be set for August 3, 2009.

[22] I am informed that the settlement conference did not proceed on August 3, 2009, because the mother claimed to be suffering from pneumonia.

[23] As a result of the peace bonds in the Territorial Court, which did not include any exception for orders of this Court, I understand that notwithstanding my order of June 23rd, the grandparents were effectively denied access to the child for a period of two months until August 18, 2009.

[24] On September 11, 2009, the mother and the grandparents attended a family law case conference to discuss the status quo pending a full hearing on the access issue. By then both sides had retained lawyers. A further order was consented to allowing the grandparents supervised access to the child at the child's daycare for five hours every Friday.

[25] The child is now attending kindergarten at the same elementary school at which the mother is employed. I am told that she also has various activities during the weekdays and weekends, including break-dancing, native dancing, ballet and swimming.

[26] When the grandparents initially brought this application, they were seeking the same amount of access time that the father was entitled to under the consent order from 2006, as well as shared time with the child on special occasions and holidays, and permission to take the child outside of the Yukon for an extended holiday each year. However, since retaining counsel, the grandparents have tempered their position, such that they are now seeking the following specified access:

1. one visit per week, from after school at 3:30 p.m. until 7 p.m.;
2. one overnight visit at least once per month, from Friday after school at 3:30 p.m. until Saturday at 11:00 a.m.;
3. some amount of time during the Christmas holidays, including at least one overnight stay during those holidays; and
4. up to two weeks during the child's summer vacation.

They also submit that there is no justification for their access to be supervised.

[27] The mother wants the discretion to say when and how access will be exercised. She has offered one day a month to start, with the possibility of an increase in the future, if things improve. However, she still insists that, for reasons which follow, any access remain supervised.

[28] On September 30, 2009, the mother filed her own affidavit, as well as affidavits from her fiancé, her sister, her father and mother. Those affidavits included various allegations of physical violence within the grandparents' family, particularly involving their four sons, now all adults, one of whom is the child's father. The allegations also include charges of certain racist attitudes and conduct by both the grandparents and their sons. Some instances are particularized, but many are quite dated, going back as much as five years and more. The mother seems to paint a picture that she had no choice but to tolerate the violence and racism for most of the child's early life because of her single-parent status and her need to upgrade her education.

[29] The grandparents have since filed extensive affidavit material of their own, including affidavits from three of their sons (but not the child's father), denying the allegations of physical violence and racism and asserting their good character.

[30] This is an interim application and not a trial. There has been no cross-examination by either the grandparents or the mother on any of the affidavits, which in many cases are directly contradictory. Accordingly, it is virtually impossible to make any determinations on credibility. The little use that I can make of this evidence is that it helps to explain the nature of the acrimony between the grandparents and the mother.

[31] My interpretation of the case law relating to grandparental access is that it is normally within the discretion of the custodial parent(s) to determine the nature and frequency of any access by a grandparent(s) to a grandchild. It is only when the custodial parent unreasonably or arbitrarily denies or limits such access, in a manner which adversely affects the best interests of the child, that the courts will intervene to make specific orders.

[32] As far as I could determine, the grandparents' counsel only referred to one case where a court had ordered specified access to the applicant grandparents. That case is *Peck* v. *Peck*, [1996] O.J. No. 755, and although it had some similarities to the case before me, it is ultimately distinguishable on the basis that the custodial parent, the respondent mother, had clearly been denying and frustrating the grandparents' access to their grandchild for a significant period of time following the separation of the child's parents. This is noted in the following comments from Hardman Prov. J., at para. 18:

> "... it is seldom that a party resists so unreasonably access so clearly in the best interests of the child. The respondent mother's attitude since the time when she first cut Jessica off from the ongoing relationship with her grandparents right up to trial has demonstrated a very immature, self-focused and stubborn approach to the entire matter. ... The respondent has failed to establish the threat to her home and health that might form the basis for a decision that access would threaten the security of the family unit. ... While it is important to respect a parental decision regarding which

> people are to be a part of a child's life, surely a parent is expected to have some "best interests" reason for the decision in order for a court to uphold it on a "best interests" basis. The evidence in this matter is overwhelming that access is in the best interests of the child." (my emphasis)

[33] On the evidence before me, while the mother may have acted rashly in cutting off access in the late spring and early summer of this year, I am not persuaded that she is presently acting so unreasonably or arbitrarily that the time has come for me to intervene and make an order for specified access. For now, I am prepared to leave it within the mother's discretion as to when and how access by the grandparents will be exercised.

[34] However, on the issue of supervision, the evidence put forward by the mother is problematic. Firstly, it is quite dated. Secondly, it is virtually all denied by the grandparents and their witnesses, not to mention contradicted by the grandparents' character references. Thirdly, I tend to agree with the grandparents' counsel that it is difficult to understand how the mother would have been content to allow the grandparents such generous access for all those years if she genuinely believed that the child was somehow in danger or at risk of being exposed to an unhealthy family environment. It seems improbable, at this stage, that the grandparents would have exercised access for most of the child's life, largely without incident, and all of a sudden have turned into violent and racist "monsters", to use the expression by the grandparents' counsel. Thus, it appears uncomfortably likely that the accusations may have been motivated by the mother's desire to provide a combative response to the grandparents' access application, similar to the mother's allegations made in the Territorial Court in support of her applications for peace bonds against the

grandparents. In any event, the grandparents' counsel suggested that any residual concerns this Court may have in this area can be addressed by a condition that the grandparents not exercise their access in the presence of any of their four sons. That seems a reasonable compromise and, subject to that condition, I order that future access will be unsupervised.

[35] I would also caution the mother that, while I am prepared to leave it to her to decide when and how access may be exercised, any hint of access being denied or limited either unreasonably or arbitrarily will very likely trigger a return to court by the grandparents, seeking an order for specified access. While such an order is not this Court's first choice, it may be one which is favourably considered in the future. Further, if the mother wishes to rely upon the allegations of violence and racism as justification for supervised access, or for a denial of access, in the future, then those allegations should be tested at trial, or at least through cross-examination of the various deponents. Finally, while not prejudging anything, I remind the mother that mere acrimony between her and the grandparents may not be sufficient to interfere with the close connection they have established with the child.

[36] This result is no doubt disappointing to the applicant grandparents, given the extent of their historical access to the child. However, the case law indicates that, generally speaking, grandparents have to accommodate themselves to a parent's decision regarding the amount and type of access. Further, the applicants must learn to accept the fact that this child not only requires a significant amount of quality time with her mother (and fiancé), she must also share her time away from her mother with three sets of grandparents, as well as the maternal great-grandparents. As a result, while the

child's time with the applicants may end up being far less than they desire, it still may be within reason and in the child's best interests, in the context of this complicated family matrix. Therefore, I would similarly caution the grandparents not to be too quick to come back to this Court alleging that the mother is being unreasonable. Should such an application be found to be without merit, a remedy of court costs against them could make that an expensive exercise.

CONCLUSION

[37] The grandparents' application is allowed in part, in that they are granted reasonable, unsupervised access to the child at times and places, and in the manner determined by the mother. However, the mother shall not unreasonably deny or limit such access.

[38] I did not hear any submissions with respect to costs from either counsel. If necessary, they may arrange for a further hearing before me to speak to the matter. However, given that there has been mixed success on the application, I would strongly urge each side to bear their own costs.

Gower J.