SUPREME COURT OF YUKON

Citation: *T.M.G.* v. *S.D.I.*, 2009 YKSC 28

Date: 20090417
S.C. No. 03-D3626
Registry: Whitehorse

Between:

T.M.G.

Petitioner

And

S.D.I.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Norah Mooney — Counsel for the Petitioner
Fia Jampolsky — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The mother, who resides in Whitehorse, was granted interim custody of her two children, 8 and 6 years old, by an order of this Court dated December 2, 2008 ("the 2008 order").

[2] The father, who resides in Edmonton, had custody of the children outside the Yukon from March 29, 2006, to December 2, 2008. He now applies to set aside the 2008 order based on lack of notice of the December 2, 2008 hearing. He also applies for an order under s. 6(3) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), to transfer the variation proceeding to Alberta. This is not a hearing of the variation application but

a hearing to determine if the 2008 order should be set aside and the variation application transferred to Alberta. After a full hearing on affidavits on February 9 and 10, 2009, I dismissed the father's applications for the following reasons.

BACKGROUND

[3] The mother and father were married on August 4, 2000, in Whitehorse. They were divorced on July 2, 2004 in this Court, on the mother's application.

[4] At the time, the mother and father were represented by lawyers, and they filed a Consent Corollary Relief Order on July 2, 2004 ("the 2004 order") stating that the parents would share joint custody of the children. The order stated that neither party would pay child support, which also suggested that the parents intended to share custody of the children.

[5] There was no activity on the court file until March 2006, when the husband applied for custody, with the consent of the mother. A consent order, signed by the mother, was filed March 29, 2006 ("the 2006 order") and granted custody of the two children to the father. The 2006 order also ordered the mother to pay child support in the amount of $236 per month to the father.

[6] The father filed an affidavit in support of the 2006 order stating that he was in a new relationship and the children had been in his sole care and custody since the breakdown of his relationship with the mother in November 2003. He stated that the mother had exercised no access to the children between July 2004 and January 2006.

[7] The mother subsequently exercised access pursuant to signed Notice of Visitation letters on January 15, January 28, February 4 and February 11, 2006.

[8] The mother stated in November 2008 that she signed the 2006 order because she was not in a position to care for the children because she was suffering from depression, was being treated with medication and had been hospitalized. She also stated:

> I was still suffering psychologically from significant mental and physical abuse that I had experienced during the relationship with [the father]. I did not have the courage or the strength to raise this as an issue at the time and essentially “gave up”.

[9] I find this to be a fact that is undisputed in this application.

THE FATHER IN HAY RIVER

[10] After obtaining the 2006 order, the father moved to Hay River, Northwest Territories with the children.

[11] The mother attempted to maintain contact with the children by e-mails which were exchanged between May 3, 2006 and February 18, 2007. They paint a picture of the mother trying to maintain contact with the father and the children and seeking access. However, the father actively discouraged access as demonstrated by the following comments:

> … here is my problrm we are a family we have just become comfortable as a family (my spouse) is their mom they call you (mother’s name). wheneverthey talk to you life gets hard. and i don’t know what to do with it.
> i talked it over with them and they want to come see you but they dont want to be away from me at all. i explained that they would leave me for a long time and go very far away to see you and they dont want to do that. i was figuring maybe i will have to come back for 2 weeks in 2007 for you to see them but for them to go there without me is out of the question. their mental stability is most important to them and that is why i wont let them go there for a month without me.

> you have been out of the picture too long and arent a part of their life. the introduction of you again would be to hard on them but I will let you see them when I come there. …

[12] The father did not take the children to Whitehorse.

[13] The mother and father had further e-mail conversations about a disturbing child pornography incident between the father's co-worker and the children which was never satisfactorily resolved or explained. The mother's last contact with the children in Hay River was an internet chat in April 2007, when the father advised that he would be returning to Whitehorse because of his failed career and relationship.

[14] After the internet chat in April 2007, the father changed his phone number, blocked his e-mail address, and stopped all contact between the mother and her children. I should add one exception. The father produced an e-mail dated July 30, 2007, which did not disclose the new location of the children and repeated his active discouragement of any access.

THE FATHER IN EDMONTON

[15] The father moved to Edmonton in May 2007. The only information that the mother received about the children was a worrisome report from a friend who visited the father in July 2008 and found an exceptionally filthy house with very little food. The father apparently was spending most of his time on his new laptop while his children were filthy and living in an appalling mess.

[16] The mother was able to obtain the services of a lawyer. She also reported the situation described by her friend to Family and Children's Services in Alberta. She was advised that there was an investigation of the father underway. The mother attempted to

obtain the Alberta child protection file of the father but was unable to do so prior to the 2008 order granting custody of the children to the mother.

[17] Despite a glowing report from the father's babysitter, which I do not accept, the evidence from Alberta is that child protection concerns have been ongoing with the father, the most recent being a physical discipline incident with the oldest child. The Director, under the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, applied for a supervision order for the children to be heard on November 28, 2008. It appears that as a result of the 2008 order made by this Court, the Alberta authorities did not proceed to obtain an order. However, Alberta Children's Services did not resolve their protection concerns and indicated that they would reassess their need for involvement should the children be returned to the father's care. It should be noted that the Alberta child welfare authorities assisted the mother in enforcing the 2008 order of this Court. I conclude, without going through all the details, that there is evidence of serious physical abuse by the father on the children.

[18] There is a substantial amount of evidence on the past and present care of the two children which I will not relate as this is not the variation hearing itself.

NOTICE TO THE FATHER

[19] The question to be addressed is whether the interim custody order should be set aside based on the father's allegation that he did not receive notice of the variation application. As the father had not provided the mother with any information about his location, the lawyer conducted a website inquiry of 411.ca and whitepages.ca to locate an address for the father. This revealed an Alberta telephone number but no address. The lawyer's assistant called the father to obtain an address to provide him with

documents. The father refused to provide an Edmonton address and gave a post office box number in Whitehorse. The father confirmed that he would receive the documents in Edmonton. The lawyer was also aware of the father's hotmail.com address which is his current e-mail address.

[20] The mother's lawyer obtained an order without notice on October 20, 2008 to substitutionally serve the father with the mother's variation application by mailing the documents to the father's Whitehorse box number and by e-mail to his e-mail address.

[21] The mother's lawyer delayed the filing of the mother's application until November 24, 2008 as she was trying, without success, to obtain the child protection file from Alberta. The father was substitutionally served with the mother's application to vary custody both by e-mail and by mailing the documents to the father's Whitehorse box number on November 26, 2008. This correspondence notified the father of the application to be heard on December 2, 2008.

[22] The father swore that on December 3, 2008, he received documentation that an order was made on December 2, 2008 granting custody of the children to the mother. He denies having notice of the proceeding on December 2, 2008 at his e-mail address. He also swears that he received the mother's court documents from his box number on December 3, 2008. He states that he did not know that the mother's lawyer was bringing a custody application, in which case he would have arranged for personal service. This statement by the father is simply untrue as the father advised the Alberta child welfare authorities during an interview on October 30, 2008, that he was under stress from a custody application by the mother.

[23] Rule 12 of the *Rules of Court* provides the following for substitutional service:

> Court may order substituted service
>
> (1) Where for any reason it is impractical to serve a document as set out in Rule 11, the court may order substituted service, whether or not there is evidence that the document will probably reach the person to be served or will probably come to the person's attention or that the person is evading service.
>
> How substituted service effected
>
> (2) Substituted service of a document is effected by taking the steps that the court has ordered to bring the document to the attention of the person to be served.
>
> …
>
> If document does not reach person
>
> (11) Even though a document has been served in accordance with subrules (4) to (9), a person may show, on an application to set aside the consequences of default, on an application for an extension of time or on an application in support of a request for an adjournment, that the document
>
> (a) did not come to the person's notice, or
>
> (b) did come to the person's notice at a time later than when it was served or effectively served.

[24] Rule 12(11) does not apply to court-ordered substituted service. The *Rules of Court* do not make any provision for setting aside service effected through court-ordered steps. However, in fairness to the father, I will treat the 2008 order as a default judgment. Pursuant to Rule 17(16), the court may use its discretion to set aside the 2008 order. Rule 17(16) states:

> Court may set aside or vary default judgment
>
> (16) The court may set aside or vary any judgment entered under this rule.

[25] In order to succeed in an application to set aside a judgment under Rule 17(16), the applicant must meet the criteria set out in *Miracle Feeds* v. *D. & H. Enterprises Limited* (1979), 10 B.C.L.R. P 58 (Co.Ct) at 61:

1. that he did not wilfully or deliberately fail to appear on this application;
2. that he made an application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought;
3. that he has a meritorious defence or at least a defence worthy of investigation.

[26] I do not take issue with the father meeting factors 2 and 3. He has had custody of the children for approximately five years, and despite the intervention of the Alberta child welfare authorities, he has provided evidence of positive parenting of the children. He has also brought the application in a reasonable time following the 2008 order. Unfortunately, his failure to respond to the application may have a wilful or deliberate quality to it based upon his past attempts to prevent access by the mother to their children and his knowledge on October 30, 2008, that she was making a custody application.

[27] However, regardless of my concern about the first criterion, the application to set aside an order is discretionary and there are several reasons why I do not think it appropriate to set it aside. Firstly, Rule 12 does not require that a substitutional service is actually received or comes to the attention of the person so served. Secondly, and this is part and parcel of the first reason not to exercise my discretion, the father was actively engaged in denying the mother access. While this consideration has an impact

on the merits of the father's suitability to regain custody of the children, it also reduces the sympathy one might otherwise have for a person who alleges he failed to be given notice of an application. Thirdly, the father was given an opportunity to be served personally, but he declined to cooperate and disclose an Edmonton address where he could be served. Finally, given his computer literacy and previous blocking of his wife's e-mail access, I am not inclined to accept his evidence that he did not receive e-mail notice.

[28] For all of the above reasons, I exercise my discretion to refuse to set aside the 2008 order granting interim custody of the children to the mother.

THE SUBSTANTIAL CONNECTION TO ALBERTA

[29] The father also applies pursuant to s. 6(3) of the *Divorce Act* for the transfer of the variation proceeding to Alberta on the grounds that the children are most substantially connected with Alberta rather than the Yukon.

[30] Section 6(3) of the *Divorce Act* states as follows:

> Transfer of variation proceeding where custody application
>
> (3) Where an application for a variation order in respect of a custody order is made in a variation proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the variation order is sought is most substantially connected with another province, the court may, on application by a former spouse or on its own motion, transfer the variation proceeding to a court in that other province.

[31] However, it is also the case that this court has jurisdiction to hear this variation proceeding at the outset by virtue of s. 5(1) of the *Divorce Act* which states:

> Jurisdiction in variation proceedings
>
> 5. (1) A court in a province has jurisdiction to hear and determine a variation proceeding if
>
> > (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or
> >
> > ...

[32] Thus, the onus is on the father to establish why the proceeding should be transferred. The case law provides certain factors that must be considered and then, if the child is most substantially connected with another jurisdiction, the proceedings will be transferred if it is in the children's best interests to do so: *Holt* v. *Lippert* (1996), 21 R.F.L. (4th) 241 (Man.CA) and *Shields* v. *Shields*, 2001 ABCA 140. The following factors have been considered in *Chung* v. *Fung*, [1996] B.C.J. No. 918 (S.C.) and *G.R.B.* v. *G.M.N.*, 2008 BCSC 843.

1. The presence of the child in the jurisdiction;
2. the length of residence in each competing jurisdiction;
3. the strength of the child's bonds to persons and circumstances in each province;
4. whether the removal was wrongful or unilateral;
5. whether the removal was justified in light of abuse directed at the children by the parent in the other province;
6. the behaviours of parents towards compliance with interim custody orders;
7. the province where evidence of the children's present circumstances is most readily available; and
8. the province where this issue of custody can be most easily and cheaply determined.

[33] In support of this Court retaining jurisdiction, the children have been present in the Yukon since December 5 or 6, 2008. The children were born in the Yukon and lived here until March 2006. While the mother consented to the removal of the children to Hay River, she expected their return to the Yukon in May 2007 when they were taken to Alberta without her knowledge or agreement. This Court has exercised jurisdiction since 2004. The children were removed from Alberta by court order for valid reasons relating to child protection concerns for the children. The father, although he had a custody order, was not compliant with the parental obligation to ensure access to the non-custodial parent.

[34] In the father's favour to transfer jurisdiction to Alberta, he is the parent who has had effective custody of the children since 2004. There is no doubt that Alberta has the best evidence about the children's most recent circumstances.

[35] However, I am of the view that most of the factors listed above support this Court retaining jurisdiction.

[36] I am also of the view that even if the factors favoured the children being most substantially connected with Alberta, it would not be in the children's best interests to transfer the proceeding to Alberta, based on the risk to the children that they would be apprehended or placed in the custody of an abusive father.

[37] I conclude that it would not be in the best interests of the children to transfer jurisdiction to Alberta. I therefore dismiss the application of the father to set aside the 2008 order and transfer the proceeding to Alberta. Costs may be spoken to, if necessary.

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VEALE J.