SUPREME COURT OF YUKON

Citation: *G.G.* v. *H.D.*, 2009 YKSC 52

Date: 20090724
S.C. No. 08-D4073
Registry: Whitehorse

Between:

G.G.

Petitioner

And

H.D.

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Kathleen M. Kinchen	Counsel for the petitioner
Edward J. Horembala	Counsel for the respondent
Christina W. Brobby	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] The father brings an interim application for supervised access to the younger child who resides with the mother. The mother opposes the application for supervised access and submits that access by the father should be prohibited at this time. The father has been found guilty of common assault against the mother, but has appealed the finding of guilt. Since the separation of the father and mother, the father has been charged with three counts of besetting and watching which are set for trial in September. This interim

application has proceeded on affidavit evidence but a trial date for a full hearing has been set for January 2010, to deal with the custody, access, financial and property issues.

UNDISPUTED FACTS

[2] I am going to divide the evidence into the categories of undisputed facts and disputed facts. Undisputed facts are those which are not disputed or cannot reasonably be in dispute. Disputed facts are those in which the evidence is completely contradictory and it is difficult to make conclusive findings. These contradictions are better left to trial for resolution.

[3] The mother and father were married in India in 1998. The marriage was arranged by their parents. The mother, a Canadian citizen, returned to Whitehorse to apply for landed immigrant status for the father. The mother had a child from a previous relationship (“the older child”). Some immigration difficulties were encountered, and the father did not arrive in Canada until 2001. The mother is 10 years older than the father. They apparently tried to have a child but were unsuccessful until 2004 when the younger child was born.

[4] It is clear that the father left the matrimonial home in the spring of 2003. The mother describes it as a disappearance. It was before the birth of the younger child, while the mother was pregnant. The father claims it was because of the way he was treated by the mother and her brother. In any event, the father returned to Whitehorse for the birth of the child and subsequently worked in a store in Whitehorse for several years.

[5] In early 2006, the mother and father had a dispute about the discipline of the older child and their evidence about that situation cannot be reconciled. As a result of that

difference, the father left the relationship for approximately six months before reconciliation occurred in the fall of 2006.

[6] In January 2008, the mother and father separated permanently. It is undisputed that the father was found guilty of common assault against the mother in January 2009, after a trial. The trial judge found that a dispute arose and the father struck the mother in the mouth. The father was also charged with knowingly uttering threats to cause bodily harm to the mother. The trial judge dismissed this charge because he was not satisfied beyond a reasonable doubt that the threat occurred, nevertheless, he was satisfied that the threat probably occurred. I am satisfied that this means that on the standard of proof required for this application, proof on a balance of probabilities, the threats to cause bodily harm were made.

[7] The trial judge did not convict the father but rather ordered that he be discharged on the conditions prescribed in a probation order. The period of probation is 18 months and the conditions relevant to this application are as follows:

> 4) Report to the Family Violence Prevention Unit to be assessed and attend and complete the Spousal Abuse Program, as directed by your probation officer.
>
> 5) Take such other assessment, counselling and programming as directed by your probation officer. Complete any programming as directed by your probation officer.
>
> 6) No contact directly or indirectly or communication in any way with (the mother) except with the prior written permission of your probation officer in consultation with Victim Services and Family and Children's Services or as authorized by a court of competent jurisdiction.

[8] The trial judge ordered the father be discharged conditionally in March 2009. The father filed an appeal of the finding of guilt in April 2009. At the date of this application on

June 23, 2009, the father had not reported to the Family Violence Prevention Unit. He deposed as follows in his affidavit supporting this application:

> I am prepared to take any counselling that my probation officer recommends. At this time my probation officer has asked me to call him once a month to check in with him.

[9] The father attended the mandatory program entitled “For the Sake of the Children” in July 2008. The mother has not yet attended the program but her counsel indicates she intends to do so.

[10] On April 20, 2009, the father was charged with two counts of harassment of the mother in March 2009, and two counts of harassment of the mother in April 2009. The bail conditions pending the September hearing of these charges order the father to have no contact directly or indirectly or communicate in any way with the mother or the two children. Counsel for the father indicated that if the father succeeds in this application, a further application will be required in the Territorial Court.

[11] While the father continues to deny that he verbally or physically abused the mother, the fact that the mother made certain reports to her doctor cannot be reasonably disputed:

1) The handwritten medical notes of the mother’s doctor dated August 6, 2003 read as follows:

> Patient is pregnant. She broke in tears when I asked her about her pregnancy. She is being abused by her husband, but stated that her life is not in danger. I’ve discussed with her that matter and informed her that the abuse (verbal or physical) is a criminal offence and nobody has the right to do that to her. Contact police if needed/escape plan and try to solve the matter with hub in a peaceful manner.

2) The handwritten medical notes of the mother’s doctor dated November 2, 2006 read as follows:

> hit 5 - 6 times on left side head October 26 by spouse. dizzy. H/A + (erased) left ear pain only when driving.

3) The handwritten medical notes of the mother's doctor dated January 14, 2008 read as follows:

> h/o fall from stairs husband pushed down. Husband is really mean to her 1st son (name) and she is really worried about that. Now always one or other fights... (illegible)... the issue. She kept her son at her brother's place. Her son is not complaining about anything but others started to talk about the way he treats (the son). ... Offered help, but she don't want to report this anywhere.

DISPUTED FACTS

[12] The father presents a very different view of his relationship with the mother. On his arrival in the Yukon, he found it difficult at the outset to learn a new language, adjust to a different culture and not be able to contact his parents and younger brother very often. He said that the mother only permitted a call to his family once every two weeks. He states that the mother is a very jealous person who is constantly watching him. He states that he felt compelled to leave an English course because the mother became upset when she saw him in a photograph sitting next to another female student. He describes the mother as completely controlling his life to the point of depositing his pay cheques in his account and controlling all household expenditures.

[13] He describes being very involved in the setting up of a new restaurant franchise with the mother and her brother but not being given the ownership position that he expected. This matter will clearly be explored in more detail at the trial. However, the father says this was the reason for his first departure from the family. He states that the mother begged him to return home on a daily basis for three weeks and after learning

that she was pregnant, he returned to the family home. He was not allowed to work at the family restaurant, and for the next 3 1/2 years worked in another retail business.

[14] The father states that the mother worked very long hours with the result that he was responsible for most of the child care for both children. He also states that he did most of the grocery shopping and housecleaning. The mother states that her mother was the one who did the housecleaning and cooked all of the meals. She said that the father did not do more than occasionally shop for groceries.

[15] There is contradictory evidence on the subject of a trip to British Columbia when the younger child was still a baby. The father claims that his mother-in-law had taken the child to British Columbia and he traveled by bus for the purpose of seeing the child whom he missed. The mother denies that this trip occurred. However, both parents agree that the father went to British Columbia for a period of separation as the result of a slapping incident. The father states that in February 2006, he was looking after the children. The older child would not stop playing with a soccer ball and eat his lunch, and this led to him dropping the soccer ball and spilling his lunch all over the floor. The father explained that he got upset and raised his voice with the older child because the child did not listen. The father states that when the mother arrived home from work that night, the older child was crying when he told his mother about the incident. The father says that the mother came into the living room and slapped the younger child across the face, saying to the father “how does it feel.” The mother’s evidence with respect to this incident is that the father struck the older son in the face. The mother denies striking the younger son in the face and states that the younger son was in British Columbia with her mother at the time. The father states that, after leaving Whitehorse, he remained in British Columbia for six

months until the mother appeared and apologized for everything she had done and agreed to stop working so much and help out around the house. The father agreed to try once more to make the marriage work.

[16] The father says that the mother did not change her ways on his return. He expected to be fully involved in the family finances and placed on the mortgage (which I interpret to mean he expected to be a joint owner of the family home). He states that this did not occur and the relationship broke down again in January 2008. He states that the mother lied to the police about being assaulted and he subsequently left the family home.

[17] In February 2008, the father states he exercised access at the mother's home on the occasion of the children's birthdays. He says that the mother realized that the relationship was over and she started to make threats that she would get him fired from his job and have him deported to India. He also says that she said she would make sure that he would never see his son again. The father began to save money to retain a lawyer. He states that when he did retain a lawyer in June 2008, the criminal charges relating to the incident of January 21, 2008 were laid shortly after. Many of the circumstances surrounding these events, such as the mother's delay in proceeding with criminal charges for cultural reasons and her embarrassment about a second divorce, have been considered in the findings of fact in the criminal proceeding set out above.

[18] The father states that he was advised by his lawyer not to proceed with the access application until after the first criminal proceedings were dealt with. There was one further incident in November 2008 when the father attended at the mother's residence with two friends in an attempt to exercise access to the children. The harassment charges that result from this incident have been stayed by the Crown.

[19] For the purposes of this application for interim supervised access to the younger child, I am unable to reconcile the numerous affidavits that provide completely contradictory evidence about the mother or father. However, the father is in a new relationship and his current partner states that he is calm, quiet and gentle. He has never been abusive to her and she states that he has a good relationship with her young daughter. The father is also supported by friends who depose that he is a good father when they have observed him with both children of the mother.

[20] A longtime friend of the mother has provided evidence with respect to statements made to her by the younger child and the older child. She is an educational assistant and has been the community representative on the Care and Capacity Review Board and currently holds executive positions on relevant community associations. She states that the older child has told her about being assaulted by the husband and the fact that he has observed assaults by the husband on his mother and on the younger child. She further states that the younger child also stated that he has been assaulted by the husband and that he has observed his dad beat up his mother. A childcare worker, who is also a longtime acquaintance of the mother, deposed that the younger child told her that his dad had hit his mother on several occasions. She says that when the younger child tells her this, he becomes very emotional and upset. There has been no cross-examination on these affidavits.

THE SUPERVISED ACCESS PROPOSAL

[21] The father proposes that a husband and wife team supervise his access to the younger child during two 1-hour periods per week. The proposed supervisors have excellent credentials in mediation and counselling for children and families, particularly

for divorcing families. They have contracted with the on-call Emergency Child Protection Service for the Government of Yukon for 18 years. They have provided their own list of conditions, and counsel for the mother and the child advocate have made additional suggestions. If I decide to approve the supervised access proposal, only one supervisor needs to be present and the supervised access will be subject to the following conditions:

1. The child's safety and caring for his needs, emotional and physical, are the first priority. In other words, the best interests of the child are always paramount.
2. There will be one visit of a duration of one hour per week. A one-hour visit means "up to" one hour and can be terminated at any time at the sole discretion of the supervisor. An explanation will be given to the father only after the child has been returned to his place of residence.
3. The father must remain in the space or room designated for the visit and that space has been agreed upon by counsel. The child will be taken for a drink or to the bathroom, if necessary, by the supervisor during the time of the visit. The designated site for the visit and the designated supervisors cannot be changed without the written consent of all counsel and the child advocate.
4. The father must speak in the English language only and must not engage in whispering with the child.
5. If the child initiates a conversation that mentions the mother, the father must respond in a neutral or positive way. No criticism or negative comments

regarding the custody or access circumstances or the mother are to be expressed in front of the child.

6. The supervisor will advise the father at the outset of a hand signal that will be used to caution the father that what he is doing or saying is verging on the inappropriate in the context of the visit. In the event that the father does not change his behaviour to comply with the request of the supervisor, the visit may be terminated at the discretion of the supervisor.

7. The supervisor must maintain line-of-sight supervision of the child at all times and the father must not impede the line-of-sight supervision at any time.

8. The designated supervisors must be provided, in advance of the first visit, a copy of the reasons for judgment in the criminal trial, the reasons for the conditional discharge of the father, a copy of the new charges, as well as the conditions of bail.

9. There will be court supervision of the supervised access and either party or the child advocate or a supervisor may refer the matter to a case management conference on an urgent basis. The child advocate shall arrange for a case management conference at least every two months and more frequently if necessary. Any party may bring on an urgent court application regarding the supervised access.

[22] If I understand it correctly, the professional person preparing the custody and access report may require the opportunity to assess the father and the younger child

together without supervision. If that is the case, counsel may request a case management conference that may include the professional person.

[23] The only issue to be determined in this application is whether there should be supervised access or no access at all at this time. I will now turn to the law and my decision.

THE LAW

[24] Access disputes are decided by determining what is in the best interests of the child. In *Young* v. *Young*, [1993] 4 S.C.R. 3, at paras. 59 and 81, the Court stated that access is the right of the child because ultimately the benefit and real cost and burden of all custody and access arrangements falls on the child. There is a plethora of case law precedents in this area. However, for the general principles applicable to access, I am going to rely upon the case law presented by counsel. The general principles, found in *Dhillon* v. *Dhillon*, 2001 YKSC 543 and *H.L.M.* v. *J.J.P*., 2005 YKSC 3, are as follows:

1. a child should have as much contact with each parent as is consistent with the best interests of the child;
2. the access of a child to a parent is the right of the child;
3. the best interests of the child requires consideration of the condition, means, needs and other circumstances of the child;
4. access may be denied to a parent if it is not in the best interests of the child;
5. the past conduct of a parent may be taken into consideration if it is relevant to the ability of that person to act as a parent of a child;
6. the onus is on the parent seeking access, to establish on a balance of probabilities that access is in the best interests of the child.

[25] In *Dhillon* v. *Dhillon*, I found that the father was both physically and psychologically abusive to the mother in circumstances that would have been witnessed by the child. In that case, I decided that unsupervised access was not appropriate at that time but that some form of supervised access by a trusted non-family person was a possibility. In that case, and in most cases for access based on affidavit evidence, no expert evidence is provided to assist the court in determining the impact that the spousal abuse may have on the child. The court must take into consideration the seriousness of the abuse and its impact upon the spouse. It is also important to consider whether it is abuse that is pre-separation or post-separation as the latter is considered much more serious.

[26] In *H.L.M*. v. *J.J.P*., the child was fourteen months old and the parents had had a short common-law relationship. The mother described the father's behaviour throughout the relationship as violent and assaultive towards her. After the separation, the father began to harass the mother by telephone and on one occasion forced her vehicle off the road. The maternal grandparents ultimately became the custodians of the child and the father was granted specific unsupervised access. As the court applications continued, the details of the assaults of the father on the mother in the presence of the child were revealed. On one occasion, when the mother was pregnant with the child, the father smashed a VCR tape over the mothers head and threw her to the ground. He grabbed a chainsaw and began to cut down one of the interior walls of their home. When the mother tried to leave, he picked up the chainsaw and held it to her throat, threatening to kill her. He then took an extension cord and threatened to hang himself. In another incident, the father cut the mothers lip with a ring and pled guilty to assault with a weapon. He was accepted into the Domestic Violence Treatment Option Program under

the supervision of the Territorial Court. In that case, I suspended the father's access to the child until he could make an application for access, hopefully with evidence from the Domestic Violence Treatment Option program in support. I concluded that the father did not satisfy the onus that his access to the child would be in the best interest of the child until he addressed the issue of his violent behaviour in the presence of the child.

[27] As stated in *Dixon* v. *Hinsley* (2001), 22 R.F.L. (5th) 55 (Ont. S.C.) at paras. 56 - 66, there is a growing body of case law that denies access to an abusive spouse. The cases typically involve repeated physical violence and emotional abuse by a man to his female partner and in some cases to the children as well. Most of these cases also involve some form of post-separation spousal abuse or harassment. Zuker J. concluded at para. 66 that even if there is no immediate risk to the child, a court should deny any access if it is not satisfied the child will receive some benefit from the access visits.

DECISION

[28] In the case at bar, I am satisfied on the balance of probabilities of the following:

1. that the father assaulted the mother in January 2008;
2. that, based on affidavit evidence of two witnesses, the children and particularly the youngest child are quite aware of the violent behaviour of the father towards their mother;
3. that, based on affidavit evidence of the educational assistant, both children have said that the father has assaulted them on occasion;
4. that the father has been ordered to report to the Family Violence Prevention Unit to be assessed but has not complied with this direction.

5. that the mother reported the abuse of the father to her doctor long before any court proceedings.

[29] The particular difficulty posed in this case is that the father is exercising his right to appeal the finding of guilt and therefore makes no admission of guilt and takes no treatment. His counsel submits that the father has done everything he can in the circumstances, particularly in putting forward a safe and secure supervised access plan. In other words, while his counsel acknowledges the finding of guilt in the assault on the mother, she submits that the supervised access proposal addresses any concerns for the child's interests, because the access would not be allowed to continue if there is any negative impact on the child's best interests.

[30] Counsel for the mother submits that the supervised access proposal does not address the emotional side of the child's best interests and that it cannot be in the best interests of the child to have access to someone in complete denial. The child advocate, while acknowledging that the proposed supervised access plan is a good one, remains troubled by the finding of guilt for the assault, the medical evidence suggesting a history of violence and the potential for post-separation harassment which must still be dealt with in criminal court. The child advocate submits that the history of violence against the mother and the allegations of assault on the children support the case for no access at this time.

[31] This is not a case where the magnitude of the violence approaches the facts in *H.L.M.* v. *J.J.P.* However, it is a case where I have found that the younger child has not only observed violence against his mother but has been subjected to violence himself from the father.

[32] In my view, the father has presented a good plan for supervised access, but it is premature to order supervised access at this time. There are significant concerns, based upon the evidence that I accept, about the best interests of this child that cannot be resolved until the custody and access report is completed and provides some evidence that access would be in the best interests of the child. I find that it would not be appropriate to order supervised access in the face of proven and alleged assaults on the mother and the children where the father is in complete denial and has no understanding of how his conduct affects the child. There is also no evidence of the impact of the violence upon the child and whether it is in the child's best interests to have visits with his father. It may be that oral evidence at trial may change these interim findings but that remains to be seen.

[33] I order that there be no access to the child at this time. The application for interim supervised access is dismissed. Counsel may speak to costs, if necessary.

VEALE J.