SUPREME COURT OF YUKON

Citation: *D.L.J.* v. *P.G.M.*, 2011 YKSC 38

Date: 20110415
Docket S.C. No.: 10-B0111
Registry: Whitehorse

BETWEEN:

D.L.J.

Plaintiff

AND:

P.G.M.

Defendant

Before: Mr. Justice E.W. Stach

Appearances:
Malcolm Campbell — Appearing for the Plaintiff
Emily Hill — Appearing for the Defendant

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] STACH J. (Oral): Between May 2005 and December 2010, D.J. and P.M. cohabited in Carcross as common-law spouses. D.J., now 35, has a son, D., from a previous relationship. She has had *de facto* custody of D. for several years, and D. was a member of the J.-M. household. In January 2008, D.J. gave birth to a son, C., also a member of that household. It is undisputed that P.M. is C.'s biological father. At present, D. is nearly 13 years of age. C. is but three years and three months old.

[2] The spousal relationship between D.J. and P.M. was described as rocky. It endured many separations in its short five-and-one-half-year lifespan, at least six of them from the intermittent incarceration of P.M. on a variety of criminal charges and

convictions.

[3] Both spouses have some history of dependence on alcohol and drugs. Both, in the materials before the Court, allege violent behaviour on the part of the other spouse. Their spousal relationship ended in December 2010 at a time when P.M. was sentenced to seven months in jail. P.M. remained in jail but on the cusp of being released at the hearing of this application on April 15, 2011.

[4] Two aspects of this application were fulsomely argued. One, the application by D.J. that she be granted interim custody of D., C., P.J., born May 31, 1998, and C.P.C.J., born January 8, 2008. Second, that she be allowed leave to move with both children to Edmonton, Alberta.

[5] I shall begin with the first claim for relief, namely that of interim custody. To their very great credit, both parents have taken some steps to overcome their alcohol and drug dependence, and to remediate their lives. From the materials before me, I formed the impression that D.J. is more firmly ensconced in the path to wellness than P.M., and more committed to it. She has also taken parenting and other courses. She is, in my judgment, more committed than he to effective parenting.

[6] I regard P.M. as a well-meaning parent who has, as I have indicated, taken some steps to overcome his alcohol and drug dependence. Nevertheless, I am persuaded that he is but partway on his path, and that he requires greater ongoing progress and support to prevent backsliding into negative behaviours and pursuits. He, like D.J., has the potential to be a positive role model for these children, and both of them, by their recent remedial efforts, have given some positive expression to that potential.

[7] I accept that on this application D.J. has established that for the most part she has been the primary caregiver of the children. Because I am persuaded that D. has proceeded more fulsomely along the path to remediation of her life, I conclude that the interim custody of these children should be in her care. She has, from the material, indicated a drug-free lifestyle for the past three years, and indicates further that she has not been intoxicated by alcohol in that interval.

[8] The Court needs to be persuaded, I think, that the history of frequent incarcerations by P.M. is behind him. It remains for him to demonstrate that that is the case. There is also an indication of some behaviour on the part of P.M., which he acknowledges in his affidavit, in part, that gives rise to some concern about whether the children can properly be placed in his custody. For all of those reasons, I order that the interim custody of these children be placed forthwith into the care of D.J.

[9] It emerges from the material that P.M., despite his incarcerations, has a meaningful role to play in the lives of these children, and more particularly, C. It is for that reason that, on an interim basis, I direct that he have reasonable access to the children on reasonable notice.

[10] I turn now to the application by D.J. for relocation from Carcross to Edmonton, Alberta, with the children. I say at the outset that I am sympathetic to the plight of D.J. and sympathetic, also, to her aspirations for enhancing her education, and ultimately her aspiration to become a nurse with a B.S.C.N. degree. I think it follows that to the extent that a parent can succeed in improving his or her lot in life, it gives rise, also, to a "leg up" to the children of that parent.

[11] The proposed move by D.J. from Carcross to Edmonton is also significant in a couple of other respects. It would mean that she passes from a circumstance in Carcross, where she had no employment and little prospect of finding employment, to immediate placement in a job paying $15 per hour. I accept also that D.J. has taken appropriate steps and secured placement in a program that can ultimately lead her, if she applies herself, to the degree and to the career that she aspires to.

[12] At the same time, I have some serious difficulty with her proposal. Those concerns, as I indicated to counsel during their submissions, related to the absence of any apparent thought being devoted to access for P.M. if the children should relocate with D.J. to Edmonton. In her first affidavit, she says simply that she would not be opposed to facilitating access between the children and P.M. if he were to come to visit Edmonton during the winters. She makes passing reference to the same proposition in her second affidavit, noting that P.M. will have all of his off-season to accomplish that. There is no thought extensively given in her proposal to ensuring that P.M. remains a meaningful part of the lives of these children. It is in short because of the absence of any thought or planning being devoted to the matter of access that I feel obliged to deny her application for leave to move to Edmonton presently with the children.

[13] I have other concerns about the proposal to move to Edmonton that may have implications for the children. There is, in the affidavit filed by D.J., a reference to an apartment having been secured, but there is no indication among other things about how much rent is to be paid, and when, and whether the job that is in prospect for her in Edmonton pays enough to look after the rent. There is no indication in the proposal she makes to indicate what, if any, arrangements are being contemplated for D. in terms of

his continuing education, and no indication as to the proximity to the proposed residence or apartment of a school for D.

[14] The other aspect of the proposal of D.J. that gives rise to some concern is that of childcare while D.J. is at work, and ultimately while she is at school. She indicates in an affidavit that her brother, E., has offered to live with her and to help with the rent and childcare. It is much preferred, I think, if there were before the Court an affidavit from E. setting out his position in the community, his ability to act as a childcare giver, and his ability and degree of commitment to help with the payment of rent, if indeed that is necessary.

[15] These are lingering concerns that are capable, I think, of being addressed. But before a Court is apt to grant approval to move to Edmonton with the children, the Court will require greater assurance than is presently apparent that the children will be well provided for and that it is in their best interests to be allowed to leave with D.J. to go to Edmonton. So I do not dismiss her application for relocation entirely, but I will grant her leave to reapply for relocation on further and better material, and the ability to do so on seven days notice.

[16] In the submissions made by counsel, there was but scant reference to the claim for child support that is raised in the notice of application. No doubt, that emanates from the fact that P.M. remains incarcerated as we speak. There remains the prospect of his employment with the White Pass Railway come May. Should that materialize, I assume that counsel will be prompt to renew this aspect of the application, and I grant leave for that to occur. The child support issue, when it arises, may well have to account for the

fact that there are three children of P.M., if one includes D. as part of his responsibility.

[17] Also claimed, but not addressed at length during submissions, were the claim for a passport, and again it follows from what I have already said that that is a matter that more appropriately comes up in the future should the application for relocation be renewed.

[18] As to costs, it seems to me that there is divided success on the application, and I am not therefore disposed to award any costs.

[19] I conclude by confirming that I am not seized of this matter, and should the application for relocation be renewed, in whole or in part, it can be heard by another judge of this court. Unless there is anything further, counsel, I am going to adjourn.

[20] MR. CAMPBELL: If I could just have a moment, please. Nothing further, My Lord.

[21] THE COURT: Ms. Hill.

[22] MS. HILL: My only question, you made an order for reasonable access on reasonable notice, I wasn't sure whether that was to just C. or to C. and D.?

[23] THE COURT: It is to both, although D. is reaching an age where he may have something to say about things.

[24] MS. HILL: Yes.

[25] THE COURT: I say no more than that.

[26] MS. HILL: Thank you.

[27] THE COURT: Thank you all. We will stand adjourned.

STACH J.