SUPREME COURT OF YUKON

Citation: *L.A.B.*. v. *M.B.T.,* 2011 YKSC 53

Date: 20110606
Docket S.C. No.: 05-D3773
Registry: Whitehorse

BETWEEN:

L.A.B.

Petitioner

AND:

M.B.T.

Respondent

Before: Mr. Justice J.R. Groves

Appearances:

Stephanie Schorr	Appearing for the Respondent
Tess Lawrence	
L.B.	Appearing on her own behalf
André Roothman	Appearing as Child Advocate

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GROVES J. (Oral): Before me today is the matter of B. v. T., which, by my view, is a terribly unfortunate case. The issue between the parties appears to be an issue regarding custody and access of their child, A., who is almost 11 years old, by my calculation. In December of 2010, by way of a telephone application, I granted Mr. T. interim custody. Ms. B. --

[2] THE PETITIONER: Interim sole custody.

[3] THE COURT: Interim sole custody.

[4] THE PETITIONER: With no merit or grounds.

[5] THE COURT: The Petitioner indicated at that time that she was in British Columbia, and, to use her words, was seeking political asylum. The child, A. was in the care of her father, and based on those factors, I granted him interim custody.

[6] Ms. B., who is self-represented, and Mr. T., who is represented by counsel, as well as Mr. Roothman, who is counsel for the child, have appeared before me on a number of pre-trial telephone conferences. It is fair to say that these have been characterized by Ms. B. yelling, making derogatory comments about lawyers and her ex-husband, and though I --

[OUTBURST AND REMOVAL OF PETITIONER FROM COURTROOM]

[7] As indicated, these pre-trial conferences have been interrupted by outbreaks and outbursts by Ms. B., which included yelling, making derogatory comments about lawyers and her ex-husband, and making allegations about murder. I have tried to patient during those proceedings. I can appreciate the stress that Ms. B.'s behaviour has caused the counsel involved, and Mr. T.

[8] Most recently, a Friday previous, an application was brought on by independent persons, a Mr. Glenn Hart and a Penny Prysnuk, who had been subpoenaed in anticipation of this trial by Ms. B. These persons were subpoenaed and the affidavit evidence before me at that time suggested that they had no real knowledge of Ms. B., and had no information to give the Court as to the custody situation of the child, A.

[9] Ms. B. has, through these numerous court proceedings by telephone, always spoken about a theory that she has. I do not see this concern as relevant to these proceedings, which, as indicated, is a custody proceeding in which the issue before the Court is the best interest of A. This theory appears to relate to Dennis Fentie, who I understand was the Premier of the Yukon until recently, was somehow involved with the death of someone named Elijah Smith, who I understand to be a respected Yukon elder.

[10] Last Friday, Ms. B. brought on a formal application to have me recuse myself from this case and to adjourn the trial. Additionally, there appears to be an application today, brought on by Ms. B., to be able to adduce evidence by way of some sort of tape recording on which she says someone testifying that Dennis Fentie killed or was involved in the death of Elijah Smith. Ms. B. is insistent on this being played in court. She has indicated she has taken it to the RCMP and has had no satisfaction. Again, I am at a complete loss as to what this issue, if it is an issue, has to do with the issue before the Court, which is what is in the best interest of A.

[11] I heard Ms. B.'s application today - I should say I sort of heard her application. At some point, after hearing from Ms. B. for approximately 20 minutes, I asked her to sit down, as she appeared to be getting overly heated, overly aggressive, again began making derogatory comments, pacing, pointing fingers, and refusing to follow the direction of the Court - simply speaking without any rational tone. When Ms. B. did sit down, I asked counsel to respond. Ms. Schorr began that process and was constantly interrupted by Ms. B. Ms. B. was asked to remain seated, and refused.

[12] When the issue arose about some documents which I had previously ordered Ms. B. receive, which counsel attempted to e-mail to her and, though that was not successful, were made available by counsel for her to pick up at counsel's law firm, Ms. B. became very agitated. She held the binder of these documents over her head, and said, "I do not have these documents," which in and of itself did not make a lot of sense as she had the documents in her hand. She then threw the binder on the table. I cautioned her not to do that. She said I could throw her in jail; at least then she could get a lawyer. She then picked up the binder again and threw it back on the table, knocking over a water glass.

[13] At this point I asked the sheriff to take Ms. B. into custody and adjourned court for a half an hour in the apparently faint hope that she would calm down. I understand Ms. B. had an opportunity to speak to some counsel. Ms. B. returned to the courtroom and her behaviour continued. The record will show what her behaviour was. She indicated a desire to leave. I indicated my desire to give a ruling. She refused to cooperate, and, again, she had to be escorted from the room.

[14] I have heard Ms. B. on three occasions over the phone and now on two occasions this morning in court. Her behaviour is most concerning. She yells; she interrupts; she makes derogatory comments about counsel. She claims that this case is somehow related to an alleged conspiracy involving Mr. Dennis Fentie with the death of Mr. Elijah Smith. She claims bias or conflict in regards to the action of the child lawyer, Mr. Roothman, in regards to Mr. Justice Veale, who is a resident judge in the Yukon and has made a number of interim rulings, and now she claims bias and conflict with her application for me to recuse myself. Generally, her behaviour, though I am not a

psychologist or a psychiatrist, appears to be that of someone who is not thinking rationally, someone who is obsessed with an action which is not related to the matter before the Court.

[15] In terms of the application to recuse myself, counsel for Mr. T. has provided the case of *L.M.B.* v. *I.J.B.,* [2000] A.J. No. 1542, a decision of Mr. Justice Veit of the Alberta Court of Queen's Bench. I am satisfied that the test set out for recusal in paragraph 13 of that case is an appropriate test in the Yukon. Paragraph 13 reads:

> There are a great many situations in which a judge becomes disqualified from acting. These are summarized in the Ethical Principles for Judges as follows:
>
> 1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.
>
> 2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interests (or that of a judge's immediate family or close friends or associates) and a judge's duty.

Additionally, paragraph 13 goes on to recite, as does the ethical principle of judges, cases in which disqualification is not appropriate related to trifling matters, and related to no other tribunal being available to act.

[16] I am satisfied on a review of the law that this is not an appropriate case for me to recuse myself. There is nothing that would prohibit me from being able to judge this matter involving Mr. T. and Ms. B. in an impartial way. Additionally, there is absolutely nothing for me to gain personally by adjudicating this matter, and, as such, no reasonable, fair-minded or informed person would have a reasoned suspicion that there

was a conflict between my personal interests and my duty as a judge. That application is dismissed.

[17] Turning to this matter generally, Mr. T., as he should, clearly wants this matter resolved. He appears ready to proceed and is, on the face of it, entitled to his day in court. I have concluded that Ms. B. does not have an ability to represent herself. She cannot control her behaviour, or she chooses not to control her behaviour. She does not follow the direction of the Court. She does not let anyone speak without interrupting them. She does not speak in a normal voice, rather, she yells. Additionally, as I have indicated, this case does not appear to me, in Ms. B.'s current disposition, to be a case in which she is concerned about her daughter. This appears to be Ms. B.'s opportunity to advocate her conspiracy theory involving Dennis Fentie and the death of Elijah Smith.

[18] In any court proceeding, the proceedings that the Court addresses must be defined and restricted to the issues raised in the pleadings. Here, these pleadings began in August of 2005, when Ms. B. defined the issues before the Court in her petition for divorce. She defined those issues as being claims for joint custody, child support, spousal support, divorce and costs under the *Divorce Act*, RSC 1985, c 3 (2nd Supp). She further raised the issue of division of property under the provisions of the *Family Property and Support Act*, RSY 2002, c. 83, of the Yukon.

[19] Mr. T. in his answer and counter-petition, filed the 27th of March, 2007, sought similar relief under the *Divorce Act* and similar relief under the relevant family legislation for division of property. Of note, there was a consent and final order in this matter on the 4th of October 2007, when both parties, Ms. B. and Mr. T., were represented by

counsel. That order appears to be a consent order. It sets out that A. is the only child of the marriage; it sets out the parties' respective income; it sets out an order for joint custody; it sets out an order for child support payable by Mr. T. to Ms. B.; it sets out that the parties are to share, A. is to reside in their respective homes on an equal basis on a two-week on, two-week off rotation. The order deals with spousal support by fixing a term for spousal support, it appears, by way of a lump sum payment. It also sets out various provisions related to who gets what property and who is responsible for what debt.

[20] As is often the case, when circumstances change, an issue of custody and child support arises again. That is what this trial has been designed to be from the moment the matter came before me in December of 2010. There appeared then to be changed circumstances. I recognized this when I made my order in December of 2010. The change of circumstances which caused A. to be in the primary care of her father, while her mother, as she put it, was seeking political asylum in British Columbia. She was not present to care for A. Logic suggested that there be an interim order that Mr. T. have custody of A., because that was what was happening, and that was the order that was made.

[21] A court proceeding is not a wholesale opportunity to introduce any evidence, to talk about any issues, to talk about any conspiracy, that you want. As I have indicated, a court proceeding is defined by its pleadings. You can certainly raise any conspiracy issue you want in a pleading related to a conspiracy, but you cannot do it in a family law proceeding in the absence of pleadings. Pleadings define the issues and let the parties know what they have to prepare for in court. There is nothing in this proceeding, as it is

litigated correctly by its pleadings, to suggest that the issues, which Ms. B. appears obsessed with, are issues before the Court. This is not a forum for the discussion of Dennis Fentie and Elijah Smith. This is a forum for the Court to determine what is in A.'s best interests.

[22] I have concluded that this matter cannot proceed with Ms. B. in her current state of mind. I am relying on the inherent jurisdiction of the Court to determine issues in regards to children, and the inherent jurisdiction of the Court to monitor its own process. I am going to direct that Ms. B. is not entitled to proceed with any application in this court until such time as she has produced, by way of affidavit evidence, a letter from a medical practitioner who is prepared to indicate that she is capable of representing herself in court proceedings, or is capable to instruct counsel in court proceedings.

[23] In my view, it would be unfair to proceed on this trial considering Ms. B.'s current state of mental well-being, and again, though I am not a medical practitioner and do not have medical training, it is clear to me that Ms. B. is not thinking rationally, is not behaving rationally, is not capable of instructing counsel, and is not capable of conducting court proceedings.

[24] I now turn to the issue of A. There is ample evidence before me, absent hearing oral evidence, about A.'s current disposition. There have been numerous affidavits before me in the past in support of the interim order that I made in regards to A. being in the sole interim care of her father.

[25] Additionally, there is the affidavit of Johanne M. Filion, who I understand from Mr. Roothman, is waiting to testify. Ms. Filion is a registered clinical counsellor in British

Columbia, though she practises in Whitehorse. She has indicated that she has met with A. and, from the review of her affidavit, I am satisfied that Ms. Filion is a person sufficiently capable of offering the opinion that she proposes to offer in her affidavit.

[26] The tenor of her affidavit suggests that A. is happy, content, and functioning well in her current environment with her father. There is also a suggestion that A. has had an opportunity to visit her mother in her mother's new home of Haines Junction. A. has some concerns about her mother's behaviour, and about the care that she receives from her mother when she is there.

[27] The most important aspect of Ms. Filion's observations begin in paragraph 31. That paragraph says:

> A. stated that she wants to live full time in Whitehorse with her father and visit her mother one weekend per month and one month in the summer. She indicated there could be flexibility in choosing which summer month she spends with which parent...

Paragraph 32:

> A. was clear in stating that her father is more understanding and supportive than her mother. She gave the … example stating that if she received a 'D' in science that her father would say, "ok, that's fine, we'll work on it" while her mother would say, "A. why did you get a D in science? I helped you but you don't do it. Why don't you do this?" A. stated that it would get her mother angry.

[28] I am satisfied from reviewing the affidavit of Ms. Filion that A.'s best interests are currently satisfied in the circumstances where she resides with her father.

[29] I am going to adjourn this matter with the provision that it is not to be set for trial before the month of June of 2012, and, again, it is only to be set for trial if Ms. B. can produce evidence by way of affidavit, as I have indicated, from a medical practitioner indicating that she is either mentally capable of representing herself or she is capable to instruct counsel. This will provide a level of security for A. for the next year.

[30] I am going to leave the issue of access in the hands of Mr. T. Clearly, A. has expressed a desire to Ms. Filion about when she wants to see her mother. Again, because of Ms. B.'s behaviour, as demonstrated in the pre-trial conferences and demonstrated in court, I am not satisfied that giving her an express right to access is appropriate. Mr. T. has taken his responsibilities as a father seriously, and I will leave it to him to determine what should be done with A.'s time with her mother. I will say to you, Mr. T., that in my view, it is generally the case that children should see parents even if parents are in a difficult situation. How you go about doing that, sir, is something you have to decide based on what is best for A. as well, and keeping in mind, that even if her mother is behaving badly, to use my words, A. will probably want to see her under some circumstances.

[31] I will say to you, Mr. T., that this is not an appropriate way to resolve things. This is a very unique case, and I am completely at a loss as to what to do other than what I have done.

[32] There is no point in proceeding on a trial with someone who is not thinking clearly. If we simply proceeded and you obtained your order, that would not, in my view, stop Ms. B. from getting to the stage where she is feeling bitter and then renewing her

application. There is really no point in proceeding, so that is why I have made the ruling today.

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GROVES J.