

SUPREME COURT OF YUKON

Citation: *M.M.D. v. J.T.C.H.*, 2012 YKSC 100

Date: 20121107
Docket: S.C. No. 11-B0017
Registry: Whitehorse

BETWEEN:

M.M.D.

Plaintiff

AND:

J.T.C.H.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Brook Land-Murphy
J.H.
Tracy-Anne McPhee

Counsel and Agent for the Plaintiff
Appearing on his own behalf
Appearing on behalf of the Director of
Family and Children's Services

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an interim interim application by the mother to vary para. 2 of the order of Justice Veale made September 28, 2011, to allow her to have interim interim residency of the child, C., who is four years old, to allow the father specified phone access and such in-person access as may be agreed upon between the parties, and to allow the child to be transported from Dawson City to the mother's residence in Ontario at her cost, essentially, as soon as she is able to make that arrangement.

[2] Although this is only an interim interim application, the principles from *Gordon v. Goertz*, [1996] S.C.J. No. 52, regarding mobility applications apply. I will begin my remarks by indicating that these are the most difficult kinds of cases that judges are faced with, because there are often compelling arguments on both sides.

[3] I have no difficulty in concluding that there has been a material change in circumstances since the order of September 28, 2011. Those include the mother's decision to move to Ontario sometime in June of this year and the fact that the father has been charged with assault and uttering threats on the child, C., based on an alleged incident on or about October 2, 2012. Those charges arose because the child disclosed to the RCMP and the social worker in Dawson that because C. had peed his pants, the father had picked him up by his shirt and thrown him on his bed. C. hit his head and his ear and hurt his arm. This occurred on the morning of October 2nd before C. went down for breakfast and then to daycare. C. said that his father was angry at him and C. was scared. C. also said that his father said that if he peed his pants again he would throw C. in the river. There was also what was described in the social worker's affidavit as severe bruising on C.'s left ear and his neck and some scratches on the right side of his head and some scratches on his neck.

[4] The third factor or circumstance which constitutes a material change is the apprehension of the child by the Director of Family and Children's Services. As a result of the social worker being made aware of the above allegations, C. was apprehended and was temporarily placed under the Director's care in the Dawson City Women's Shelter. C. remained there for a period of time until arrangements were made to have C. moved out of that facility back to the father's home, which the father had previously

agreed to vacate to facilitate the move. Since October 18th, C. has been residing in the father's home, essentially under the care of the father's current fiancée, D.H., who has apparently known C. for approximately the last two years and has had contact with him during periods when the father would have access to C. Currently, C. is having access visits with his father three times a week, supervised by the social worker for one hour on each occasion.

[5] I digress by indicating that the order of September 28, 2011 granted interim custody and primary residence of C. to the mother with specified access to the father. Apparently, that *de facto* arrangement was in place, more or less, from the date of separation, which was in August of 2010. So, for a good period of time C. has been in the primary care of his mother with involvement by the father.

[6] The next thing that I must consider is what is in the best interests of this child in the interim. Again, I digress by indicating that at the outset of this hearing the father sought an adjournment in order to obtain the money to retain counsel. His plan is to retain Mr. Roothman, who is already representing him on the recent criminal charges involving the child, as well as the child apprehension matter. He says that he will require at least three weeks to get that money together, and then some additional time for Mr. Roothman to prepare the responsive material that the father intends to file.

[7] The mother's counsel informs me that she has been in touch with the trial coordinator, and the first available date that this matter can be heard is January 21, 2013, in the afternoon. Today being November 7th, that is a significantly long period of time. So, I must consider what is in the best interests of the child in the meantime.

[8] The mother's counsel submits that where the child is presently residing, he is essentially with a third party who, prior to this change in circumstances, had only weekend access to the child. Accordingly, it would be preferable in the circumstances for the child to reunite with his mother, with whom he has a strong bond due to the fact that the mother has been the child's primary care giver since his birth. Secondly, the child would be able to re-establish his relationship with his other brother, N., who currently resides in the same general area in Ontario. Thirdly, the child would be able to re-establish relationships with several other family members residing in that general area in Ontario. The mother's counsel also asks me to respect the fact that, for all intents and purposes, the mother remains the custodial parent pursuant to the order of September 28, 2011, notwithstanding what has happened in the meantime.

[9] Again, I must digress to just put on the record my understanding of the general circumstances. The mother and the father, independently, I assume, had arranged to take vacation time in Ontario, where they each have family members, in or about June of 2012. After being down there for about two weeks, the mother has deposed that she came to the decision that she wanted to move there on a relatively permanent basis, and had discussions with the father about this and what arrangements they would make with the child. The evidence thus far, because there is no evidence on the record yet from the father, is that she had a discussion about this with the father. The father was reluctant to change the terms of the September 28, 2011 order but, as I understand it, agreed to take the child back to the Yukon with him. The mother was then to come to the Yukon at the end of the summer, paying her own way, to pick up the child and return him back to Ontario to start the school year, which would be Junior Kindergarten. She

said she obtained the father's verbal agreement on this and has affidavits from two witnesses who confirm that. The father denies that allegation.

[10] Apparently, the mother was unable to raise the funds to travel to the Yukon for September, or the end of August. She alleges that she had a further conversation with the father where she agreed to make the pick-up and transition in December, in order to have the child start his school year in January 2013. Again, that appears to be disputed by the father. So the child remained in the Yukon after being returned to this Territory with his father after the vacation in Ontario. He has been residing with the father until the incident of October 2nd, when the child was apprehended and removed from the home. The father has been placed under restrictive access conditions, as I have indicated. The father denies the assault and threat allegation, and it would appear that he is intending to go to trial on those matters.

[11] The Director of Family and Children's Services ("FCS") is represented here today. The Director takes no position on the mother's application, but has indicated that the issues of concern that they had regarding the child and the mother were threefold. The first being the mother's transitional residency in Ontario. I should digress again by indicating that the mother, immediately upon learning of the child's apprehension, was in contact with the Director's department, and indicated that she would be willing to take care of the child until the matter was resolved. As a result, there have been communications back and forth between the mother and the social worker in Dawson. So, the Director's initial concerns about the mother taking the child in Ontario were: the mother's transitional residency there, which was at that time somewhat unstable; an allegation that is fairly recent about her cocaine use, which appears to come exclusively

from the mother's former boyfriend in Dawson City; and her relative instability in terms of her employment and establishing roots in her new home. Each of those concerns have been met or addressed by the mother in the view of the Director. The mother has now provided evidence that she is moving into a new, three-bedroom home with her sister and her sister's family and their children, and there will be appropriate accommodations for the child. The mother has also provided recent evidence of a drug test that was undertaken on or about the 5th of November, and that indicates that she has not used cocaine. It does not indicate for how long, but it indicates that, at least as of the time of the test, she was cocaine-free. The third concern about instability has been addressed by the mother's now full-time employment with a collection agency in Ontario, with which the mother seems to have good future prospects.

[12] The Director also indicates that if I do make an interim interim order allowing what the mother is seeking today, then their concerns regarding the ongoing apprehension will be resolved, and FCS would essentially close their file. FCS would then send a report to the agency in Ontario, with which it is also involved, to encourage the agency to follow up with the mother, and perhaps do a home visit or a periodic check-up to see that things are going well.

[13] On the father's side, he says that he has always been actively involved in the child's life; that the child is currently in a stable home with his fiancée; that he plans to arrange for FCS to facilitate the use of a child psychologist to meet with C. The father says the child is currently and understandably confused and perhaps traumatized by the absence of his mother and the absence of his brother, N., who was apparently removed from the home earlier and returned to Ontario.

[14] The problem that I have on this interim application is that there is no evidence on the record on behalf of the father. Ms. Land-Murphy informs me, and I have no reason to think otherwise, that the father has known of this application and this hearing date since October 11th, but has not yet retained Mr. Roothman, and has not filed any materials on his own behalf. That is almost a month ago, and it is a significant concern for me that here we are without any evidence from the father to rebut what the mother has alleged. The importance of the evidence on this type of an application cannot be overstated. It is potentially disruptive for the child to move, but it is also potentially disruptive to leave the child where he is, pining for his primary caregiver. So, I would have expected more from the father. I acknowledge that he has indicated here today that he wanted to be careful and did not want to file anything impulsively that might, in the longer term, harm his chances. However, while that may have been a strategic decision on his part, it leaves me with no evidence from his side, other than his stated opposition to the move and his reasons why.

[15] The other factor that is significantly at play here is the allegation by C. about the October 2nd incident. Now, I fully appreciate that, in a criminal context, the father is presumed innocent of those charges and that he intends to follow that process through to its completion. However, in a child welfare context, and in the context of a custody and access application, the standard of proof is on a balance of probabilities and not proof beyond a reasonable doubt. The allegations are extremely serious and are of concern to me. The mother deposed that this incident took place while Ms. H., the fiancée, was residing in the family home, and the mother's concern is that there was no report by Ms. H. about the incident or any phone call or any notification whatsoever.

That may well be, at the end of the day, because the matter never happened. But, my concern here is to do what is in the best interests of the child on a temporary basis until this matter can be heard in a more fullsome manner and the father can get his responsive material before the Court.

[16] It will be a disruption if the child is allowed to move back to Ontario with the mother until this matter is heard in January, but it is also disruptive for the child to remain where he is. At the end of the day, I am persuaded for the reasons indicated by the mother's counsel that the order should be allowed. I will grant the relief that she has sought.

[17] The mother also sought some directions regarding the filing of materials, and I think it is appropriate that those directions should be included in the order that will arise from today's proceeding:

1. That the father file and deliver any responsive affidavits that he intends to rely on to Ms. Land-Murphy's office by 4:00 p.m. on December 30, 2012.
2. That the mother file and deliver any reply affidavits by January 14, 2013. If Mr. Roothman is not retained by then, then those reply affidavits may be delivered to the father by email, as has been done prior to today.
3. That the father file and deliver any further reply affidavits to Ms. Land-Murphy's office by January 17, 2013;
4. That no further affidavits will be filed after that date.

[18] Now, because Mr. H. lives in Dawson City and this matter is being heard in Whitehorse, I am going to further order:

5. That Mr. H.'s signature approving the form of this order be dispensed with. However, I will direct that the Clerk send the order up to me to be reviewed before it is issued.

[19] The last thing that I will say to Mr. H. is that because this is an interim interim order, it is expressly considered to be temporary. You do not have to establish a material change in circumstances to have it varied. When this matter is argued again on January 21st, you will be able to raise all the issues that you have raised today.

[20] Counsel, have I omitted anything?

[21] MS. LAND-MURPHY: I wonder if Your Honour can make the orders with respect to -- I am not sure whether my friend is, well, at least addressing the issues of whether Family and Children's Services and the Director is going to be added as a party, and whether the Supreme Court can sit concurrently as judge of the Territorial Court, for the purpose of deciding that application?

[22] THE COURT: Well, I am wondering -- I will hear from Ms. McPhee on that, but it is -- I sort of got the impression that you may no longer need to be a party, given what I have ordered today.

[23] MS. MCPHEE: I think that is correct, Your Honour, so long as you have no issue with us appearing today and having heard from us on this application. I don't think it's necessary for us to be a party in the continuing matter in January that is

before you. With respect to the legal authority regarding C., at the moment there is a Territorial Court order until further order of that court that indicates that he is in the temporary care, interim temporary care of the Director. I would suggest that that remain in force and effect until such a time as C. is removed from the Territory. In the event that that occurs, the Director has indicated that she will discontinue the application that's before the Territorial Court. But what my concern would be is if we ended that order today, there is -- you know, he is in a bit of a limbo and I do not think that is appropriate. I think he needs to remain in the care of the Director until such time as your order takes effect, and he is, by order of this Supreme Court, in the custody of his mother.

[24] THE COURT: All right. Well, he is already in the custody of his mother.

[25] MS. MCPHEE: Custody of his mother.

[26] THE COURT: It is a question of primary residence.

[27] MS. MCPHEE: And it's a custody of my -- of my current order, sort of, overlaying that process.

[28] THE COURT: Yes. I did not see the -- do we have -- we have the Child Welfare file here; it is underneath the big one. Can you hand that up to me? I had a look through this, and I did not see the order on the file, but maybe I --

[29] MS. MCPHEE: I can pass it up as well. I don't have the final signed version.

[30] THE COURT: Well, that is because it is not on the file yet.

[31] MS. MCPHEE: Okay. I will pass up the version that I have, which is being circulated. There has been a subsequent court appearance, and I can advise you, Your Honour, and I believe both Mr. H. and my friend will be aware, that this matter is currently still, I think, showing on the docket for tomorrow in Territorial Court. It does not need to. I have spoken to it today. I suppose my application could be one of two things; one would be to remain -- to have that order remain in force and effect, and the matter be adjourned to a docket in a few weeks where we can sort out the details if need be, and otherwise I'll withdraw the application; or I could seek the order pursuant to s. 52 of the *Family and Children's Services Act*, that there be a finding that C. is -- a *prima facie* finding that C. is a child in need of protective intervention; and then the hearing could be set. But I don't think it's necessary to do that today unless my friends are consenting to that. I take -- I take Ms. Land-Murphy's position that her client, based on your order this morning, will be attending forthwith to have C. returned to Ontario, and as a result, I think the order that's before you, once filed -- signed and filed, is appropriate for the circumstances.

[32] THE COURT: Is that your client's intention?

[33] MS. LAND-MURPHY: Yes, but she does not have -- she did not want to buy the ticket until there was a determination, but her intention is to buy a ticket immediately and then -- to go directly to Dawson City.

[34] THE COURT: Okay. Well, I am in your hands as to how you want to play this. I mean, this says until further order of the Court, which is the Territorial Court. What is the most convenient way to deal with this?

[35] MS. MCPHEE: I think I will ask that you adjourn my application on behalf of the Director --

[DISCUSSION RE: ADJOURNMENT APPLICATION TO DECEMBER 4TH]

[36] THE COURT: So, sitting wearing my Territorial Court hat for a moment, this order says that C. shall remain in the care of the Director on an interim basis until further order of the Court.

[37] MS. MCPHEE: I am not asking for any further order, I think that is sufficient. Yeah.

[38] THE COURT: No, I understand that, but what is going to happen then, so we can spell it out --

[39] MS. MCPHEE: Yes.

[40] THE COURT: -- is that when the mother comes to get the child, the Director is going to consent --

[41] MS. MCPHEE: Yes.

[42] THE COURT: -- to the child going into her care --

[43] MS. MCPHEE: Yes.

[44] THE COURT: -- and that will alleviate the need for any further proceedings in the Territorial Court, --

[45] MS. MCPHEE: It will.

[46] THE COURT: -- and at some point there will be some kind of a, what, an order, or a --

[47] MS. MCPHEE: I will file a notice of discontinuance of my application.

[48] THE COURT: A notice of discontinuance. Okay. If that is done before the 4th, can you please notify Mr. H., so he does not appear unnecessarily?

[49] MS. MCPHEE: I certainly will. He'll be advised, yeah.

[50] THE COURT: Okay. So I can hand this back to you. Okay. Thank you. Are there any outstanding issues?

[51] MS. LAND-MURPHY: Sorry, Your Honour, just so that I am clear in drafting the order on it, so is the -- Your Honour, is sitting concurrently as both Territorial Court judge and Supreme Court judge today?

[52] THE COURT: No, I think for the -- well, I am, in effect but the order does not have to reflect that. There is no need for it.

[53] MS. LAND-MURPHY: Okay. So is there going to be a --

[54] THE COURT: So the order will be in the Supreme Court.

[55] MS. LAND-MURPHY: Is there going to be term of the order adjourning the Territorial Court action to December 4th?

[56] THE COURT: Oh, I see. Okay, yes, there should be a separate order for that adjournment then.

[57] MS. MCPHEE: It's my understanding, although I'm surprised by this practice, Your Honour; it is my understanding that if the only order on these files is for an adjournment to a separate date, that no order is actually filed.

[58] THE COURT: Okay.

[59] MS. MCPHEE: So if you are prepared to make that order --

[60] THE COURT: Less paperwork.

[61] MS. MCPHEE: Yes, less paperwork.

[62] THE COURT: I am prepared to make that order. So that the Territorial Court matter - again, sitting as a Territorial Court judge - will go on my order to December 4th at 9:30 a.m. to be spoken to.

[63] MS. MCPHEE: Thank you.

[64] THE COURT: No paperwork has to be done on that.

[65] MS. LAND-MURPHY: So that will not be included in the Supreme Court order?

[66] THE COURT: No. It is in the Clerk's notes on the Territorial Court file. It will be, will it not, Madam Clerk?

[67] THE CLERK: Yes, Your Honour.

[68] THE COURT: All right. So your order, regarding the mobility issue, is simply on the Supreme Court file.

[69] MS. LAND-MURPHY: Thank you.

[70] THE COURT: Is that clear?

[71] MS. LAND-MURPHY: Yes.

[72] THE COURT: Okay. Is there anything else?

[73] MS. MCPHEE: Sorry, that application is adjourned to January 21st?

[74] THE COURT: Oh yes, yes. Sorry, that should form part of the order, Ms. Land-Murphy, the date for the adjournment.

[75] MS. LAND-MURPHY: Thank you, and just to clarify, rather, with respect to the deadlines; is that by 4:00 p.m. each of those times when the affidavits are to be delivered?

[76] THE COURT: Yes.

[77] MS. LAND-MURPHY: Okay. Thank you.

[78] THE COURT: Again, you are going to leave a note on the file, Madam Clerk, to send it up to me for review?

[79] THE CLERK: Yes, I have already noted that, Your Honour.

[80] THE COURT: Okay. Mr. H., do you have any questions?

[81] J.H.: Yes. Your Honour, as -- if Your Honour has made the judgment that he is to return to his mother in Ontario, can we please put kind of stipulation in that my son is to talk to somebody? Some kind of child psychologist, somebody to help my son? Because he has been through an awful lot, and I don't know if we can do that, but I don't have any faith in his mother that she would think of that. She has been through an awful lot and she has never --

[82] THE COURT: That is a decision that is made by the custodial parent. I think Ms. Land-Murphy has heard your concerns about it. I would hope that she would pass those concerns along to her client, and encourage her client to do that, because I think that would be in the best interests of the child, but it is the kind of micromanagement that I am not going to get into.

[83] J.H.: Yeah.

[84] THE COURT: Okay?

[85] J.H.: Okay.

[86] THE COURT: But thank you for raising it.

[87] J.H.:

I appreciate your time.

GOWER J.